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REPORTS
OF
CASES DETERMINED
IN THE
CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT,

FROM OCTOBER TERM, 1861, TO OCTOBER TERM, 1867,

BY

HON. NATHAN CLIFFORD, LL D.,

ASSOCIATE JUSTICE OF THE SUPREME COURT, ASSIGNED TO SAID CIRCUIT.

WILLIAM HENRY CLIFFORD,
COUNSELLOR AT LAW,
REPORTER.

VOLUME II.



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JUDGES
OF THE
UNITED STATES COURTS
IN THE FIRST CIRCUIT
DURING THE TIME OF THESE REPORTS.

HON. NATHAN CLIFFORD, LL. D.,
ASSOCIATE JUSTICE OF THE SUPREME COURT.

HON. ASHUR WARE,
DISTRICT JUDGE OF MAINE.
Resigned, 1866.

HON. EDWARD FOX,
APPOINTED DISTRICT JUDGE OF MAINE, MAY, 1866.

HON. MATTHEW HARVEY,
DISTRICT JUDGE OF NEW HAMPSHIRE.
Deceased April 7, 1866.

HON. DANIEL CLARKE,
APPOINTED DISTRICT JUDGE OF NEW HAMPSHIRE, 1866.

HON. PELEG SPRAGUE,
DISTRICT JUDGE OF MASSACHUSETTS.
Retired March Term, 1864.

HON. JOHN LOWELL,
APPOINTED DISTRICT JUDGE OF MASSACHUSETTS, 1865.

HON. JOHN PITMAN,
DISTRICT JUDGE OF RHODE ISLAND.
Deceased November, 1864.

HON. JONATHAN RUSSELL BULLOCK,
APPOINTED DISTRICT JUDGE OF RHODE ISLAND, 1865.

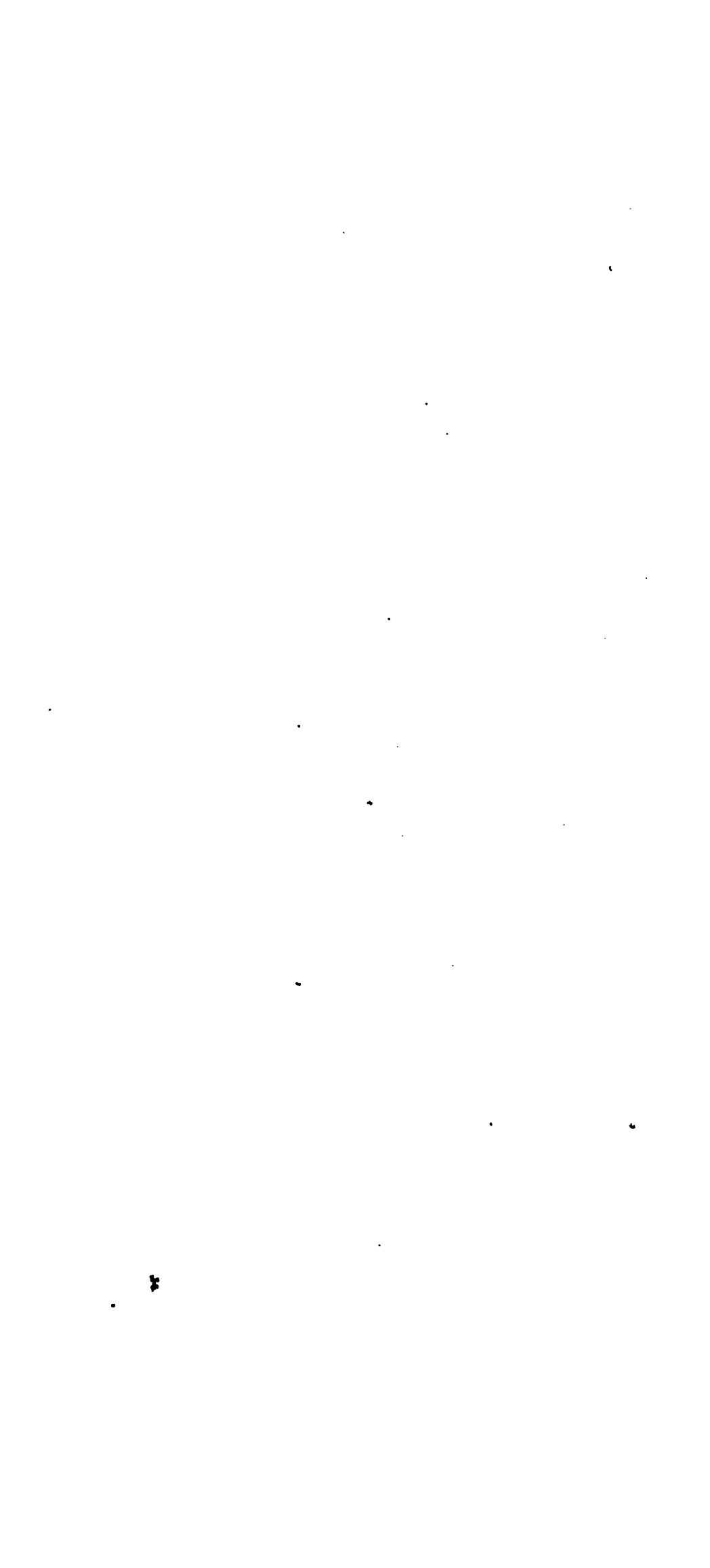


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CIRCUIT COURT OF THE UNITED STATES.

MASSACHUSETTS DISTRICT.

OCTOBER TERM, 1861.

JOHN STEVENSON *v.* HORACE KING *et al.*

A certificate of discharge under the bankrupt or insolvent laws of one State cannot be pleaded in bar of an action brought by a citizen of another State.

ASSUMPSIT upon a promissory note signed by a firm of which the first defendant was a partner.

The case came before the court upon demurrer to the plea filed in bar of the action. The note was dated at New York, and was made payable at the Rockland Bank in Roxbury, Mass. It appeared that the plaintiff was a citizen of New York. Service was duly made upon the defendant first named, who appeared and pleaded a certificate of discharge under the insolvent laws of Massachusetts, after the maturity of the note.

S. G. Clark, for plaintiff, in support of the demurrer.

The insolvent laws of a State can have no effect upon the rights of foreign creditors; therefore a discharge in insolvency under the insolvent laws of a State is no bar to an action on a contract where the creditor is a citizen of another State. *Ogden v. Saunders*, 12 Wheat. 368, 369; *Buckner v. Finley*, 2 Pet. 586; *Boyle v. Zacharie*, 6 Pet. 348, 634; *Springer v. Foster*, 2 Story, 387; 3 Story, Com. § 1103; *Woodhull et als. v. Wagher*, Bald. 296; *Braynard v. Marshall*, 8 Pick. 196; *Savoye v. Marsh*, 10 Met. 594; *Isley v. Merriam*, 7 Cush. 242; *Fry v. Kisk*, 4 Gill. & Johns. 509; *Donnelly v. Corbett*, 3 Seld. 500; *Poe v. Duck*, 5

Md. 1; *Demeritt v. President of Exchange Bank*, 20 Law Rep. 606.

The fact that the contract was to be performed at the place of domicile of the defendant cannot affect the question.

J. Wilder May, for defendants.

The debt in this case was provable under the statute, and is discharged by its terms. Stat. of Mass. 1858, c. 163, §§ 3, 7. In this case the contract, by its express terms, was to be performed in Massachusetts.

In *Ogden v. Saunders*, cited by plaintiff, the court say the discharge is invalid against a creditor "who has never voluntarily subjected himself to the State laws otherwise than by the origin of the contract." The implication is, if the creditor has so subjected himself, then the discharge would be valid against him.

The note being made payable in Massachusetts, the general rule is, that its validity, obligation, and interpretation are governed by the law of the place of performance. Story's Conf. of Laws, § 280; 2 Kent's Com. 459; *Prentiss v. Savage*, 13 Mass. 21.

The law of the place of performance is taken into consideration when the contract is made. See *Andrews v. Pond*, 13 Pet. 65; *Pope v. Nickerson*, 3 Story, 484; 2 Pars. Con. 583.

Plaintiff "has subjected himself" to the laws of Massachusetts in making the contract. *Whitney v. Whiting*, 35 N. H. 457, 462, 472; *Scribner v. Fisher*, 2 Gray, 43; *Burrall v. Rice*, 5 Gray, 539; *May v. Breed*, 7 Cush. 15.

CLIFFORD, J. Since the decision of the Supreme Court in *Cook v. Moffat et al.*, 5 How. 307, I do not see how there can be any misunderstanding as to what that court has decided upon this subject. Speaking for a majority of the court, Mr. Justice Grier, after referring to the case of *Ogden v. Sanders*, 12 Wheat. 213, and to the case of *Sturges v. Crowningshield*, 4 Wheat. 122, and stating the facts in the former case, says that a majority of the court there decided, first, that a bankrupt or insolvent law of any State, which discharges the person of the debtor and his future acquisitions, is not a law impairing the obligation of contracts, so far as it respects debts subsequent to the passage of such law ;

second, that a certificate of discharge under such a law cannot be pleaded in bar of an action brought by a citizen of another State. He makes no exceptions to the principle, and plainly did not intend to qualify the doctrine in any respect. On the contrary, he expressly affirms, in the same opinion, that, after the decision of the court in the case of *Sturges v. Crowningshield*, it followed as a corollary, from the modification and restraint of the power of the States to pass such laws, that they could have no effect on contracts made before their enactment or beyond their territory. Some misapprehension having existed as to what the opinion of the court was, the chief justice also took occasion to express his views upon the general subject. He had ruled the case at the circuit in obedience to what he understood to be the settled doctrine of the court, and a majority of the court affirmed the judgment. Acquiescing in that judgment, as a correct exposition of the law of the court, he nevertheless thought it proper to restate the individual opinion which he entertains. Before doing so, however, he gave a clear, full, and, as I think, satisfactory exposition of what had been previously decided by the court. Those remarks of the present chief justice, taken in connection with the previous explanations given by Chief Justice Marshal, in *Boyle v. Zacharie et al.*, 6 Pet. 348, and by Mr. Justice Story, in *Boyle v. Zacharie et al.*, 6 Pet. 642, it seems to me, ought to terminate all further discussion upon that point. At all events, the question is at rest in this court, and must remain so for the present, unless it shall be revised by the supreme judicial tribunal of the country. Demurrer sustained. Plea in bar adjudged bad.

EDWARD KIMBALL v. SHIP ANNA KIMBALL AND CARGO.

Under the terms of the charter-party in this case, the owner of the ship has a lien on the cargo for the payment of the freight.

The effect of this is not changed where the charter-party stipulates that the balance of the charter was payable one half in five days and one half in ten days after discharge of homeward cargo.

Charter-parties may be so framed as to defeat the implication of a lien on the cargo for the freight.

But it is necessary to examine the whole instrument, and to compare the parts invoked to defeat the lien with all the other parts.

Delivery without any condition or qualification annexed is a waiver of the lien, because the lien is but an incident to the possession.

But where delivery is made, upon an understanding between the parties that the transfer of the goods from the ship to the warehouse shall not be regarded as a waiver of the lien, no such consequences follow.

In this case the clause giving the five and ten days' credit was not a waiver or displacement of the lien, because the word "discharge" refers to the unlading merely, and not to the delivery of the cargo.

Where two notes of \$ 5,000 each were received by the owner of the vessel, before her arrival at the home port, payable to his order in six months, and he gave a receipt for them to the charterers, stating that the notes were received on account of the charter of the ship, and that the amount was to be insured by the charterers and charged to the owner, it was held, that the notes were not received or given in payment, but as an accommodation to the owner; and having been tendered at the trial, the libellant is entitled to recover the whole balance of the charter-money, after deducting other payments.

Payment undoubtedly discharges the lien of the ship-owner; and promissory notes accepted as payment will have the same effect as payment in money. At common law, a promissory note given for a simple contract debt does not operate as a discharge of the original obligation, unless the intention of the parties to that effect affirmatively appears. But the rule in this State is different, and the question in this case must be governed by the rules of law prevailing in the jurisdiction where the transaction took place.

In this State, if a party, bound to a simple contract debt, gives his own negotiable security for it, then, in the absence of any circumstances to indicate the contrary intention of the parties, the presumption is that the bill or note was received in satisfaction of the pre-existing debt.

But as the liability for which the notes were given in this case was contingent, and as the agreement was, that, if the notes fell due before the ship returned, then the libellant was to take them up and renew them, or if the ship arrived before the notes fell due, he was to return them or deduct the amount from the charter-money, it was held they were not given or received in payment.

APPEAL in admiralty from a decree of the District Court for the District of Massachusetts. The libellant was the owner of the ship Anna Kimball. The libel alleged that on the 4th of

July, 1856, the libellant made a contract of affreightment with G. T. and W. P. Lyman, by which they agreed to pay him \$35,750 for a round voyage from New York to Melbourne, thence to Calcutta, and thence to Boston; that the vessel arrived at the return port, with her homeward cargo on board, on the 23d of January, 1858; that \$8,000 of the charter-money was paid in advance; that \$8,000 more were paid in Melbourne and Calcutta; and that \$19,750 were due, payable one half in five and the rest in ten days after discharge of the homeward cargo. It also alleged that by the contract the cargo laden on board became pledged to the libellant for the payment of the freight, and that he became entitled to a lien thereon by the admiralty and maritime law.

The charter-party contained the clause: "To the true performance of all the foregoing covenants, the said parties, each to the other, do hereby bind themselves, . . . especially the said party of the first part, the said vessel, her freight, tackle, and appurtenances; the said parties of the second part, her freight and merchandise to be laden on board."

In the answer the ownership of the libellant, the contract of affreightment, and the agreement of the charterers to pay the sum specified in the libel for the voyage therein described, were admitted; but that the libellant became entitled to a lien on the cargo for the payment of freight, that the homeward voyage was duly performed, that the vessel fully discharged her cargo, were denied in the answer. Payments in addition to those admitted in the libel were set up in the answer, namely, \$250 at Melbourne and Calcutta; \$10,000 in Boston; \$450.20 for insurance; collections of freight by libellant, to the amount of \$7,297.50; leaving due to him, if the vessel had fully delivered her homeward cargo, \$1,787.30. Certain facts were agreed between the parties in the District Court as follows:—

The following facts are agreed between the parties for the purposes of the trial of this cause:—

Of the charter-money \$8,000 was paid in advance, in the man-

ner stated in the charter-party, and \$ 8,250 was paid in Australia and Calcutta.

August 31, 1857. — On application of the libellant for the purpose named in the receipt, he received from the Messrs. Lyman two notes of \$ 5,000 of that date, on six months, payable to his order, and gave therefor the receipt, a copy of which is annexed and marked A. The libellant procured these notes to use, and did obtain money upon one of them at a bank where he was a director, and where he had a standing account. The Messrs. Lyman effected insurance on these amounts, in pursuance of the agreement, paying therefor \$415.20. In the autumn of 1857 the Messrs. Lyman failed, and on the 19th of January took the benefit of the Massachusetts insolvent law, the first publication of notice being on that day. After the failure, and before the publication of notice, the libellant tendered them back their said notes, and they refused to receive them, and the libellant has always been ready to give up said notes.

The contract between the Messrs. Lyman and the claimants was in writing, and a copy thereof is annexed, marked B. The ship was in charge of Mr. James H. Adams in Calcutta, the agent of the Messrs. Lyman, and the cargo libelled was purchased by him upon the credits furnished by the claimants, and shipped, and the bills of lading therefor were drawn and sent in pursuance of said agreement, the bills of lading being of the form a duplicate whereof is annexed and marked C. Other cargo was taken on board, the property of sub-freighters, at specific rates of freight, and bills of lading given therefor of the form annexed and marked D. The vessel arrived in Boston on the 23d of January, 1858, having been expected; when the said notes were given, to arrive in about three or four months.

The libellant has collected the freight due from the sub-freighters, amounting to about \$7,000; the exact amount of which is to be ascertained and deducted from the charter. On the arrival of the ship and discharge of the cargo the claimants made due demand for the cargo under said bills of lading, and the libellant refused to deliver it, claiming a lien thereon for all

Kimball v. Ship Anna Kimball and Cargo.

the unpaid charter-money, deducting the sub-freight collected, but not deducting the said notes of \$10,000.

The claimants were willing to pay the balance of charter-money, for the purpose of getting possession, if the libellant would allow the said \$10,000, but no offer was made to pay said balance unless the libellant yielded his claim to the \$10,000.

The cargo was libelled after the expiration of ten days from its discharge; and, on satisfactory stipulation being given in the cause for the demand and costs, it was delivered to the claimants, without prejudice to the rights or claims of either party.

The libellant tenders the said notes in court.

If the libellant recovers, and the claimants so desire, the question of deduction for short cargo shall be open and sent to a commissioner. The claimants have not received enough from the cargo to pay their advances.

A.

Boston, August 31, 1857.

Received of G. T. & W. P. Lyman their two notes (of \$5,000 each), amounting to \$10,000, of this date, payable in six months, to my order, on account of charter of ship Anna Kimball.

It is understood that this amount is to be insured by G. T. & W. P. Lyman, and charged to owners of ship.

(Signed)

EDMUND KIMBALL.

B.

No. 1163.

OFFICE OF DUNCAN, SHERMAN, & Co., Bankers,
New York, March 30, 1857.

Messrs. GEORGE PEABODY & Co., London.

GENTLEMEN:— We hereby authorize Mr. James H. Adams or Messrs. Anshoots, Day, & Co., of Calcutta, or any other parties whose drafts you may be directed by the written order of the said James H. Adams, or Anshoots, Day, & Co., to accept under this credit, to value on you at six months' sight, for account of

Kimball v. Ship Anna Kimball and Cargo.

Messrs. George T. & W. P. Lyman of Boston, for any sum not exceeding twelve thousand pounds sterling, to be used as he or they may direct for fair invoice cost of goods or merchandise, to be purchased for account of whom it may concern, and to be shipped to the port of New York or Boston by vessel or vessels. The bills must be drawn in Calcutta, or any port east of the Cape of Good Hope, prior to the first day April, 1858, and advice thereof given to you, accompanied by invoices and bills of lading, to our order, for the property shipped as above. Duplicate invoices and bills of lading to be forwarded by the vessel, under cover, to us.

It is distinctly understood that the shipping documents above mentioned are to be delivered to you prior to your acceptance of any draft or drafts under this credit, without which you will not consider yourself authorized to accept any draft or drafts by virtue hereof.

And we do hereby agree with the drawers, indorsees, and *bona fide* holders of bills drawn in compliance with the terms of this credit, that the same shall be duly honored on presentation at your office in London.

For £12,000.

Very respectfully, your obedient servants.

Please sign bills as being drawn under credit.

No. 1163, dated March 30, 1857.

N. B. All the bills of lading are to be forwarded to Messrs. George Peabody & Co. (by successive conveyance), except the one retained by the captain of the vessel, and the duplicate invoice and bill of lading by the vessel, under cover, to us.

Insurance on order at New York or Boston.

NEW YORK, March 30, 1857.

Messrs. DUNCAN, SHERMAN, & Co.

GENTLEMEN:—Having received from you the letter of credit of which a true copy is on the other side, we hereby agree to its terms, and in consideration thereof we bind ourselves to accept, on presentation, the drafts of Messrs. George Peabody & Co., or your own, at five months from the date of Messrs. George Pea-

body & Co.'s acceptances, under said credit, for the amount of such acceptances; to give you satisfactory security for their payment, if required, and to pay them at maturity, either in sterling bills payable at sixty days' sight in London, indorsed by us and approved by you, or in dollars at the rate of exchange at which you may be drawing at the time of such payment, with commission on the amount of this credit of two per cent. And we hereby give you a specific claim and lien on all goods or merchandise and the proceeds thereof, in respect of which Messrs. George Peabody & Co. may come under any engagements, under said credit, on all policies of insurance on such goods or merchandise, which we hereby agree to effect or cause to be effected, to an amount sufficient to cover the credit and all bills of lading given for said goods or merchandise, with full power and authority to take possession and dispose of the same at discretion.

And we also agree that you may reject any bills, however good, if you have at the time your limited amount on the drawees, and that in all payments or settlements, made or arising under this credit, the pound sterling shall be calculated at the current rate of exchange in New York on London, existing at the time of such settlement, and interest charged at bank rate if over five per cent. It being understood that remittances made in bills drawn by you or moneys paid to you shall be taken as payment without recourse.

Any new credits which may be granted shall be considered under this agreement and on the basis thereof, with such variations as may be arranged, together with one tenth of one per cent for stamp duty on bills of exchange, imposed by the laws of Great Britain.

(Signed)

GEO. T. & W. P. LYMAN.

C.

Shipped in good order and condition by James H. Adams, for account and risk of Messrs. Geo. T. & W. P. Lyman of Boston, in

Kimball v. Ship Anna Kimball and Cargo.

Tons. ft. in.

	L. & L. \$1 e 189	} 469 bales.	
340 1 0	A. K. 191 e 470		
37 20 0	" \$1 - 2 100 bales.		One hundred bales gy. bags.
34 6 7	" 2,000 pkts.		Two thousand pockets linseed.
29 33 0	" 320 bags.		Three hundred and twenty bags
441 20 7			ginger.

and upon the good ship or vessel called the Anna Kimball, whereof Captain T. B. Rennell is master for this present voyage, and now lying in the river Hoogly and bound for Boston,

Four hundred and sixty-nine bales gy. cloth.

One hundred bales gy. bags.

Two thousand pockets linseed.

Three hundred and twenty bags ginger.

Being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid port of Boston (all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted), unto order of Messrs. Duncan, Sherman, & Co., or to their assigns, he or they paying freight for the said goods, as per charter-party, without prime and average accustomed.

In witness whereof the master of the said ship or vessel hath affirmed to five bills of lading, all of this tenor and date, one of which being accomplished, the rest to stand void.

Dated in Calcutta, this 7th day of August, 1857.

Weight and contents unknown to

(Signed) T. B. RENNELL.

Captain's copy.

Kimball v. Ship Anna Kimball and Cargo.

D.

Shipped in good order and condition by William S. Wilmer, on board the good ship called the Anna Kimball, whereof T. B. Rennell is master for the present voyage, now lying in the port of Calcutta and bound for Boston.

To say :	14
	13
	—
	42
	14
	—

L. & W.
L. No. 205 - 222.
Tons 3 13 9.

Eighteen chests indigo, 182 being marked and numbered as in the margin, and are to be delivered in like good order and condition (the danger of the seas only excepted) unto Messrs. Lowber and Wilmer or to assigns, he or they paying freight for the said goods, fourteen dollars per ton of forty cubic feet.

In witness whereof, the master of the said vessel hath affirmed to four bills of lading, all of this tenor and date, one of which bills being accomplished, the others to stand void.

(Signed) T. B. RENNELL.

Dated at Calcutta, 27th July, 1857.

A decree was entered in the District Court in favor of the libellant, for twenty-five hundred dollars.

Motion was subsequently made in the District Court, by the

Kimball v. Ship Anna Kimball and Cargo.

libellant, that the foregoing agreed statement was "not a part of the record, and should not be certified as such to the Circuit Court, and that it should be discharged, on account of an alleged error in the same," but the court declined to entertain the motion, because it came too late, being after the decree.

Motion was made in this court, that the statement of facts be discharged, and the motion was granted, after a hearing of the parties, upon the condition that the libellant pay all taxable costs to the time of the motion, and recover none prior to that time, in case his appeal is sustained. After the discharge of the agreed statement, in the Circuit Court, the parties entered into a new stipulation, agreeing that all the previous statement was correct, except the words, "having been expected, when the said notes were given, to arrive in about three or four months."

Thaxter and Bartlett, for claimants.

The notes of \$5,000 each were made and treated by the parties as an advance of part of the charter-money, in the same manner as the notes for \$8,000 originally advanced, otherwise there would have been no agreement for insurance.

Parties may by their contract so fix the time for the payment of freight as to lose the lien of the ship on the cargo for freight. *Raymond v. Tyson*, 17 How. 53; 1 Pars. Mar. Law, 252.

Discharge is for the purpose of delivery, and the discharge must be so made that the consignee may arrange for the payment of freight and receive the goods as fast as they are discharged. *Brittan v. Barnaby*, 21 How. 529.

It has also been settled that notice to consignee that his goods are being discharged, if reasonable, amounts to a delivery so as to place the risk upon the consignee. *Richardson v. Goddard*, 23 How. 28.

To have discharged and delivered the goods in this case, according to the well-established custom, they would have been received by the consignee nearly a month before the charter-money became due.

The same is true in regard to the time of payment fixed by the two notes of \$5,000 each.

R. H. Dana, Jr. and *B. R. Curtis*, for libellant.

Kimball v. Ship Anna Kimball and Cargo.

The charter is of that class in which the owner retains a lien on the cargo. *Volunteer*, 1 Sumn. 551; *Gracie v. Palmer*, 8 Wheat. 605; *Faith v. E. I. Co.*, 4 B. & Ald. 630; *Christie v. Lewis*, 2 B. & B. 410; *Logs of Mahogany*, 2 Sumn. 589; *Tate v. Meek*, 8 Taunt. 280.

The clause giving the shipper five and ten days for payment of freight, being after *discharge*, and not after delivery, is not a waiver of the lien. *Raymond v. Tyson*, 17 How. 53; 3 Kent's Com. 122; *Brittan v. Barnaby*, 21 How. 529; *Bulkly v. Naumkeag Steam Cotton Co.*, 24 How. 386.

The notes of \$5,000 each were not payment. *Peter v. Beverly*, 10 Pet. 532; Story on Prom. Notes, § 104.

Not necessarily under the law of Massachusetts. *Mellidge v. Boston Iron Co.*, 5 Cush. 170.

This case being one of commercial law is governed by the general law of the United States and of the mercantile world. *Miller v. Austin*, 13 How.; *Carpenter v. Pr. Ins. Co.*, 4 How. 185; *Foxcroft v. Millett*, 4 How. 353; *Williams v. Suffolk Co.*, 3 Sumn. 270.

The notes not a waiver of the lien. *Volunteer*, 1 Sum. 551; *Logs of Mahogany*, 2 Sum. 589; 3 Kent's Com. 122; *Raymond v. Tyson*, 17 How.

The clause as to insurance proves nothing against this view; the insurance would operate for the benefit of whom it might concern. If the libellant returned the notes, the insurable interest would be in him; if claimants had to pay them, it would be in them.

CLIFFORD, J. The charter-party shows that the ship was chartered as alleged in the libel. By the terms of the charter-party the owner was to make the necessary repairs and provide the vessel with every requisite, and with men and provisions necessary for the voyage, and also to ballast the ship at the outward port. He agreed that the whole vessel, with the usual exception of the cabin or room in the cabin for the master and other officers, and room also for the accommodation of the crew and the storage of the sails, cables, and provisions, should be at the sole use and disposal of the charterers, and he also engaged to take

and receive on board the vessel during the voyage all such lawful goods as they might think proper to ship.

Performance of the voyage as described in the libel is admitted, and it is also admitted that the charterers have failed to pay the balance of the charter-money. On that state of the case the owner of the ship seeks, in this suit, to recover the amount of the unpaid balance from the cargo of the homeward voyage, upon the ground that he has a maritime lien on the same for the payment of the charter-money. As the consignees of the cargo sought to be charged, the claimants resist the claim and insist that the terms of the charter-party in this case created no lien in favor of the owner of the ship; and if it did, that the lien has been displaced by his own acts, at least to the amount of the notes specified in the receipt. They do not controvert the position assumed by the libellant, that in general the owner, in such cases, has a lien on the cargo for the freight, and they admit that the lien is one that is favored by the courts, and will be enforced unless clearly displaced by the acts or agreements of the parties. Conceding all that, still they insist that the clause of the charter-party providing that the "balance of charter should be payable, one half in five days and one half in ten days after discharge of homeward cargo" is inconsistent with the retention of the lien upon the cargo for the payment of that balance. Charter-parties may, doubtless, be framed with provisions so entirely inconsistent with a lien on the cargo for the freight as to defeat the implication to that effect, which would otherwise arise in favor of the owner. Whenever that suggestion is made, however, it then becomes necessary to examine the whole instrument to ascertain its true meaning, and test the suggestion by comparing the parts invoked to defeat the lien with all the other parts of the instrument. Suppose the clause in question, if standing alone, might have the effect assumed by the claimants, which is utterly denied, still the suggestion could not prevail in this case, because upon an examination of the last clause of the instrument it will be seen that the parties in legal effect have stipulated that the ship shall be bound to the merchandise and the merchandise to the ship; so that the contract itself is opposed to the theory of

the claimants. Abb. on Ship. 360; *Vandewater v. Mills*, 19 How. 90.

But the charter-party is clearly of the class in which the owner has a lien on the cargo under the maritime law, whether it be so stipulated or not in the charter-party, provided it contains no provisions inconsistent with that implication in favor of the owner. Undoubtedly the ship-owners, says Taney, Ch. J., in the case of *Bags of Linseed*, 1 Bl. 112, has a right to retain the goods until the freight is paid, and has, therefore, a lien upon them for the amount, and as contracts of affreightment are regarded by the courts of the United States as maritime contracts, over which the admiralty has jurisdiction, the ship-owner may enforce his lien by a proceeding *in rem* in the proper court. Delivery, without any condition or qualification annexed, is a waiver of the lien, because the lien is but an incident to the possession, with the right to retain the thing until the interest in it or the claim upon it is discharged. Where delivery is made, however, upon an understanding between the parties that the transferring the goods from the ship to the warehouse shall not be regarded as a waiver of the lien, no such consequences will follow; but a court of admiralty will regard the transaction as a deposit of the goods for the time, and not as an absolute delivery. Many other cases are cited by the libellant to show that the charter is of the class in which the owner retains a lien on the cargo, but it is not necessary to refer to more than one or two of them, as the recent decision of the Supreme Court recognizes the general principle for which the libellant contends, and, to that extent, is decisive of the point. *The Volunteer*, 1 Sumn. 551; *Gracie v. Palmer*, 8 Wheat. 601.

Assuming that proposition, however, to be correct, still it does not fully meet the difficulty suggested by the claimants. They do not controvert the position that in general a lien arises in cases of this description in favor of the ship-owner, but they insist that the clause giving the five and ten days' credit after discharge of the homeward cargo is inconsistent with the retention of the lien, and in fact displaces it. If the question were a new one, it would deserve more consideration than under exist-

ing circumstances it is entitled to receive. Judge Story had the same question before him in the case of *Certain Logs of Mahogany*, 2 Sumn. 600, and as usual he exhausted the argument upon the subject. He held that the clause was not a waiver or displacement of the lien, because the word "discharge" refers merely to the unloading, and not to the delivery of the cargo. That rule was rightly established at the time, has been constantly followed ever since, and at the close of a quarter of a century ought not to be changed. Five and ten days "after the discharge" are the words of the charter-party; and both the pleadings and evidence show that no part of the goods were delivered. Possession, therefore, is still in the libellant, and where that is so, the authorities are unanimous that the lien is not displaced.

It is insisted by the claimants, in the second place, that the notes of 31st August, 1857, were received by the libellants as an advance, and as payment of the amount for which they were given. Payment undoubtedly discharges the lien of the ship-owner, and promissory notes, accepted as payment, will have the same effect as payment in money. At common law, a promissory note given for a simple contract debt does not operate as discharge of the original obligation, or constitute a payment of the original debt, unless it affirmatively appears that such was the intention of the parties at the time it was given. *Clark v. Mundall*, 1 Salk. R. 124; *Dorney v. Hicks*, 14 How. 249; *Lyman v. Bank of United States*, 12 How. 225. But the courts in this State have adopted a different rule, and the question in this case must be governed by the rules of law which prevail in the jurisdiction where the transaction took place. Whenever a party bound to a simple contract debt, in this State, gives his own negotiable security for it, the presumption is, as matter of fact, in the absence of any circumstances to indicate a contrary intention of the parties, that the bill or note was given and received in satisfaction and discharge of the pre-existing debt. Such presumption, however, is not a conclusive one, but may be controverted by any circumstances which show that such was not the intention of the parties. *Fowler v. Bush*, 21 Pick. 230; *Milledge v. Boston Iron Co.*, 5 Cush. 170; *Fowler v. Ludwig*, 34 Me. 461; *Baker et al. v. Draper et al.*, 1 Cliff. 420.

Applying these principles to the present case, it is clear that the question presented is purely one of fact, to be determined from the nature of the transaction and all the evidence in the case. Brief references only will be made to the testimony, as it is not the intention of the court to enter into extended argument upon matters of fact, except in cases of real difficulty or doubt. Strong doubts arise, from the very nature of the transaction, whether parties, under the circumstances and at the date of the receipt, would give and receive notes in actual payment. The liability was certainly contingent, and it is more reasonable to suppose that if they had intended an actual payment, the language of the receipt would have been different. Claimants insist that the parties treated the notes as payment, but one of the charterers expressly states that the notes were given as an accommodation to the libellant, and that the agreement was, if the notes fell due before the ship returned, then the libellant was to take them up or renew them, and if the ship got in before the notes fell due, he was to return them or deduct the amount from the charter-money. Full confirmation of his statement is found in the testimony of the ship-broker who made the arrangement. On the other hand, the other charterer states that the notes were given without conditions, except that the libellant was to insure the amount, and have the loss payable to their firms, but he does not affirm that the notes were given or received in payment, nor does he deny the agreement stated by the other charterer. These brief references will be sufficient to show the leading features of the testimony upon which the question depends.

After careful examination of the whole evidence, I am of the opinion that the notes were not given or received in payment, but as an accommodation to the libellant, and, having been tendered at the trial, the libellant is entitled to recover the whole balance of the charter-money, after deducting the other payments. The decree of the District Court is, therefore, reversed, and the cause must be sent to an assessor to ascertain the amount.

HENRY A. PIERCE, Libellant, *v.* NATHANIEL WINSOR *et al.*

Where damage is sustained in a case not falling within the category of an inevitable accident, and neither party is in actual fault, the loss must fall on him who, from the relation he bears to the transaction, is supposed to be possessed of the necessary knowledge to have avoided the difficulty.

Respondents chartered a vessel, and put her up as a general ship. Among other freight was an article new in commerce, and which was so affected by the voyage that it injured other parts of the cargo in contact with it, and involved an increased expenditure in discharging. The dangerous character of the article was unknown either to the shippers or the owners, and no actual fault was imputed to either. *Held*, that the damage and expenses occasioned by the peculiar character of the article must be borne by the shippers.

THIS was an admiralty appeal. The respondents chartered of the libellant the ship *Golden City*, for a voyage to San Francisco, and then put her up as a general ship. A quantity of mastic was shipped as freight by the United States government from their works in New York to the fort at Fort Point, San Francisco. The mastic was in casks, and was stowed in bulk in the run. Upon the arrival of the ship out it was found that the mastic had run together and among the cargo next to it, and had then hardened in a solid mass, adhering to the sides of the ship and the other adjacent portions of the cargo. The damage done to the rest of the cargo, which was paid by the master on account of the ship, and the extra expense in breaking out the mastic with drills and chisels, amounted to \$1,900. Two other ships, the *Dashaway* and *Fleet Wing*, which sailed shortly after the *Golden City*, had also some mastic, shipped in the same way, which arrived out in the same condition. These cargoes, with one shipped in casks, after the news of the state in which the earlier cargoes had arrived out had been received, were all the cargoes ever shipped by the United States, or, so far as known, by anybody, to San Francisco, or on any long voyage. The article was manufactured by the United States government at New York, and is used on fortifications, and had been repeatedly shipped to the various forts on our Atlantic coast and in the Gulf, and had always been shipped in bulk, without giving any indications that the heat in the hold of a vessel would, under any circumstances, affect it.

The suit was brought by the owner of the ship against the charterers, to recover the damages sustained by him in payment to other shippers for injury to their goods, and for extra expense in discharging. Mastic was then a new article in commerce.

It was not pretended that the defendants had any knowledge of the dangerous character of this article, and, so far as anything was known of the article, it was thought perfectly safe to ship it in this way.

The libellant claimed to recover upon the ground that there is always an implied contract on the part of the charterer or general shipper of goods that the goods shipped shall not be of a character dangerous to the ship and the residue of the cargo, and that the want of knowledge of the true character of the goods will not release such charterer or shipper of the goods from this responsibility.

A decree was entered in the District Court in favor of the libellant for money paid by him for other goods damaged, and for the extra expense in taking out the mastic.

Sidney Bartlett and *D. Thaxter*, proctors for libellant.

The case discloses the charter of libellant's ship by the respondents for a voyage from Boston to San Francisco, and an agreement of libellant that "the whole of said vessel shall be at the sole use and disposal of respondents during the voyage," and to "take and receive on board said vessel all such lawful goods and merchandise as respondents may think proper to ship."

It further shows that an article called mastic, comparatively new to commerce, was laden on board the ship by the respondents. It may be assumed that the effect of the hot weather of the tropics during a voyage of the length and character of that in question was unknown to either party, and even to the manufacturer of the article (the government), since the mode of transport in cakes was changed to packing in barrels, after the result of this and two other contemporaneous voyages of the same character became known. The effect of this shipment upon other cargo for which the master had given bills of lading, and upon the ship herself, is undisputed.

The single question thus raised is, upon whom is the loss thus

occasioned to fall, whether upon the owner who has thus put his ship "at the sole use and disposal" of the charterer, or upon the party having that sole use and disposal?

Treated as the case of a general ship put up for freight, the case seems to have been decided by *Brass v. Maitland*, 6 El. & Bl. 470. Lord Campbell states the principle thus: "When the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port, I am of opinion that the shippers undertake that they will not deliver to be carried on the voyage packages of goods of a dangerous nature, which those employed on behalf of the ship-owner may not on inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature." p. 481.

Again: "Although those employed on behalf of the ship-owner have no reasonable means, during the loading of a general ship, to ascertain the quality of the goods offered for shipment, or narrowly to examine the sufficiency of the packing of the goods, the shippers have such means, and it seems much more just and expedient that, although they were ignorant of the dangerous quality of the goods, or the insufficiency of the packing, the loss occasioned thereby should be cast upon the shipper than upon the ship-owners." p. 483.

Again: "The defendants, and not the plaintiffs, must suffer, if from the ignorance of the defendants a notice was not given to the plaintiffs, which the plaintiffs were entitled to receive, and from the want of notice a loss has arisen which must fall either on plaintiffs or defendants." p. 486.

The soundness of this decision will be apparent, when it is considered that here is a loss which must fall upon one of two parties, and which cannot be classed with cases of mere misfortune, where neither party is in fault, and where the loss must rest where it happens to fall; for such a rule, applied to this case, would be equivalent to deciding that the loss must, in all cases, fall upon the ship-owner; or, to truly carry out such doctrine, the loss must, as to goods, be borne by the shipper whose goods are injured by the dangerous article stowed with them.

The principle on which the rule in *Brass v. Maitland* rests is founded on well-settled analogies, derived from commercial law, which principle is this: Although, in a given case, neither the shipper nor the owner can, by inquiry, find or know the dangerous character of the article shipped, yet the law, which deals with general rules, and not with special cases, fixes the liability upon the shipper, because, under ordinary circumstances, he is best able to make the investigation and know the facts, and because this rule will best protect the innocent ship-owner from experiments or frauds by the shipper, which are difficult of discovery and proof.

The most striking analogy in support of this principle is drawn from the law of insurance, by which the owner of a ship has forced upon him the agreement that she is sea-worthy, although there be latent defects which he could not discover; and this rests upon the ground that, in a great majority of instances, he may know the facts. Baron Parke states it thus (*Gibson v. Small*, 24 Eng. L. & Eq. 40): "Hence, the usual course being that the assured can and may secure the sea-worthiness of the ship, it is by no means unreasonable to imply such a contract in a policy in a ship on a voyage, and so the law most clearly has implied it. It may happen, indeed, in some cases, that from want of proper materials, of skilful artisans, of proper docks in the port of outfit, of sufficient funds or credit, or from the hidden nature of the defects, the owner may not be able to fulfil the duty of making the ship sea-worthy at the commencement of the voyage; but the law cannot regard the exceptional cases *ad ea quæ frequentius accidunt jura adaptantur*; and it wisely, therefore, lays down a general rule, which is a most reasonable one in the vast majority of voyage policies."

The case of this charter is stronger than that of a general ship, for there the owner retains some control over shipments. Here that control passed into the hands of the charterers. It was their duty to make inquiries if any were necessary. If, by reason of goods shipped by their authority, the owners of the ship suffer, they ought to make it good, whether they were in fault or not.

A. A. Ranney, proctor for respondents.

The respondents had a right to ship the mastic under the charter-party. Libellant was bound ^{to} to take and receive on board all such lawful goods and merchandise as the respondents or their agents might think proper to ship." Mastic was a lawful shipment certainly. The ship was put up as a general ship, and was so chartered and intended.

This would not exclude goods even which come within the class designated dangerous, although it might impose obligations for the exercise of greater care in some cases.

It is respectfully submitted, therefore, that respondents are not liable on this ground. Respondents were perfectly innocent in the premises, and guilty of no negligence whatever.

It is urged that there was an implied warranty on the part of respondents, that the mastic was fit to be shipped to San Francisco. To which they answer:—

No such warranty is set forth in the libel, and this ground is not open to libellant. No such warranty existed under the circumstances.

Courts have been inclined, of late, to restrict rather than extend this doctrine of implied warranty, and with reason; for it imposes obligations of a most serious nature, under a contract which the parties never understood nor ever dreamed they were making. *Dutton v. Gerrish*, 9 Cush. 89; *Chanter v. Hopkins*, 4 M. & W. 399; *Whitmore v. South Boston Iron Co.*, 2 Allen, 52; *Morley v. Attendorough*, 3 Excq. Rep. 500.

It has never been extended to, or applied in, a case like this. The contract in this case as between the ship-owner and respondents was in writing, and the written contract must govern. It is not competent to add to or vary or explain it, by parol or any such implication of law. *Chanter v. Hopkins*, 4 M. & W. 399; *Randall v. Rhodes*, 1 Cur. 90; *Dickson v. Zizania*, 2 Eng. L. & Eq. 314; 3 Greenl. Ev. § 421, n. 3; *Gibbon v. Young*, 2 Moo. J. B. 224; *Johnson v. Mils*, 14 Wend. 195.

The proposition must go to the extent, that there was an absolute warranty, without qualification, that the goods were fit for shipment on the voyage, and that they were not dangerous even

in any extraordinary degree of heat to be apprehended as possible in the hold on the voyage.

The counsel rely on *Brass v. Maitland*, 6 El. & Bl. 470, as an authority for their doctrine. This is perhaps the only case which seems to sanction such a principle. Lord Campbell, Ch. J., in giving his opinion (p. 481), says: "I am of opinion that the shippers undertake that they will not deliver to be carried in the voyage packages or goods of a dangerous nature, which those employed on behalf of the ship-owner may not on inspection be reasonably expected to know to be of a dangerous nature." Again (p. 483): "Although those employed on behalf of the ship-owner have no reasonable means, during the loading of a general ship, to ascertain the quality of the goods offered for shipment, or narrowly to examine the sufficiency of the packing of goods, the shippers have such means," &c.

Wightman, J. concurred in the opinion.

Crompton, J. combated the doctrine laid down by the other judges in giving the opinion, contending that the implied undertaking of the shipper did not extend beyond the obligation to take proper care not to deliver dangerous goods without notice.

Now, that case is clearly distinguishable from the case at bar, and when closely scrutinized is no authority for the libellant. The doctrine there laid down must be much extended and perverted to meet this case.

That case was discussed entirely upon questions raised on the pleadings, which is never quite so satisfactory as when the questions arise on a full statement of facts in the development of the case, which a trial presents. The exact case decided is alone a competent authority, and the language of the court used in discussing the matter must be distinguished from the thing decided.

In that case the first count in the declaration alleged that defendants knew that the bleaching-powder shipped was composed of chloride of lime, and was dangerous, and defendants in the third plea do not traverse this averment. Besides, the powder was well known to be dangerous, and to require safe packing. It might properly be claimed that the shipper with such knowledge was bound to see that it was suitably packed when

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shipped. The only excuse offered was that defendants procured the article of other parties who furnished it upon their order, and neither knew or had reason to believe it was not suitably packed. Now this was no excuse, perhaps, for the defendants were bound, knowing the dangerous nature of the article, to see to it that it was shipped in proper condition, and the third parties of whom it was ordered stood only in the light of agents of the defendants, there being no relation or privity between these and the ship-owner. Campbell, Ch. J., 6 El. & Bl. 485. The defendants were without fraud, but not without fault, having violated a duty imposed upon them in regard to packing. The powder was concealed by being in barrels, and the ship and its agents did not know what was in them, and had no opportunity to judge of their safety or otherwise. The name of "bleaching-powder" did not indicate or disclose the existence of chloride of lime, a well-known dangerous substance. It was virtually a deception, although not so intended. The suit was between the ship-owner and the shipper.

In the case at bar the facts are entirely otherwise in every one of these respects. The defendants did not know, and could not know, that there was any danger. No one knew it, but everybody, or those who knew most about it, believed, and had the best reason to believe, the contrary thereof. The article was shipped under the name of "mastic," which indicated the general nature. It was uncovered and open to inspection. It was seen and examined by the master and owner. The former actually made full inquiry of the United States engineers and others, and satisfied himself on the very points where the danger arose, which was then suspected by him. The respondents are the charterers of the ship, not the shippers of the goods. It is a contract of affreightment, where the ship-owner victuals, mans, and navigates the ship, and is to load, discharge, and run the ship at his expense.

The bill of lading runs from the ship to the shippers, making thereby a contract between them, and raising all the obligations expressed and implied between them. The ship has a lien on the cargo for freight, and the shipper can sue or libel the ship on the

bill of lading, and hold it to the usual obligations arising in such a relation. The respondents are to pay a round sum as freight, and are to have all the ship makes in freight above that sum. They act rather as agents for the ship in getting the cargo, and the contract of the ship is merely a covenant that, as a compensation for their labor and risk, they shall have all the money received as freight above a specified sum. Such a relation is entirely different from that of a shipper and ship-owner. *Drinkwater et al. v. Brig Spartan*, Ware, 153; *Paul v. Birch*, 2 Atk. 621; *Holt on Ship*. 471; *Christie v. Lewis*, 2 Brod. & Bing. 410; *Faith v. East India Co.*, 4 B. & Ald. 630; 3 Greenl. Ev. § 421, and notes.

The respondents were not only without fraud, but without fault. They acted with the utmost possible care and skill. The ship-owner and his master could not have been deceived and misled. They saw, examined, and inquired, and, relying on their own judgment and the information gained on inquiry, accepted and carried the goods without protest or objection. Respondents were not responsible for the wrong information they received. There could be no warranty implied under such circumstances. Such an undertaking is never implied only where, from what is done and said, the court can say that one party so agreed, and the other party so understood, and relied upon it.

The mastic was required and taken as ballast, not under the usual obligations of a regular cargo. It was shipped in the usual way, just as all had shipped it, and others were willing to take and carry it again.

Brass v. Maitland was a case of insufficient and improper packing only, and the shippers violated a duty in this regard, that is all. The right to ship the powder was not denied. And here respondents had a right to engage the mastic, and it is too much to require them to be held responsible for the packing of the goods which merchants might send to the ship. The master and stevedore, the agents of the ship, were the proper parties to look to this, and the ship could and must hold the merchants to their responsibility about the packing. The privity of contract was between the ship and the shipper in this regard, not between the

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ship and the charterer. It cannot be said that there are two implied contracts of this kind.

Again: suppose that there is a new article of commerce which neither shippers nor ship-owners know to be dangerous, is the innocent shipper to be liable? Lord Ellenborough's dictum, in *Williams v. The East India Company*, 3 East, 192, would tend to show that knowledge of the party shipping is an essential ingredient.

Mastic, being new to commerce, is just the case where it was assumed that the shipper would not be liable. But being known to be new to commerce, and accepted as such without objection, when it was seen and examined by all parties, this was notice sufficient, and takes the case out of the principle laid down in *Abbott*, and throws the risk on the ship-owner.

This is equivalent to giving notice to, or knowledge on the part of, the master, the effect of which was decided in *Brass v. Maitland*, 6 El. & Bl. 485.

If liable at all, respondents are not liable to reimburse the libellant for what he paid out to make good the damage occasioned to other goods; nor to pay for the other damages claimed. The mastic was shipped in a general ship, in the usual way, and the ship was not liable. *Clark et al. v. Barnwell et al.*, 12 How. 272; *Lamb et al. v. Parkman*, Sprague's Decisions, 343; *Baxter v. Leland*, 1 Blatch. 526; Abb. on Ship. 348.

The ship paid the damages without suit and voluntarily, giving the respondents no opportunity to defend the claims preferred, if any. It does not appear that anybody claimed the damages. Neither does it appear that the ship was liable. Whether the ship gave bills of lading in these cases does not appear in evidence.

CLIFFORD, J. Two propositions may be assumed as beyond dispute: first, that the case is not one of inevitable accident; and, secondly, that the owner of the ship is without any actual fault arising out of any act of his own, or that of the master or his agents. Inevitable accident is not pretended, and if the pretence were set up, it could not be supported for a moment. *Union Steamship Co. v. N. Y. and Va. Steamship Co.*, 24 How. 313.

Some attempt was made to impute fault to the owner of the

vessel, because she was delayed in Boston for the purpose of repairs, but the explanations are satisfactory, and the position wholly unsupported.

Neither party had any knowledge of the dangerous character of the article, so that it may be said that there was no actual fault on either side, except such, if any, as the law implies from the nature of the transaction. The charterers put up the ship as a general ship, and under the terms of the charter-party the ship was at their sole use and disposal, to ship such lawful goods as they might think proper; and it was expressly stipulated that their stevedore should be employed by the owner, in Boston. The stowage of the mastic was made in the usual way, and it is not disputed it would have been proper, if the article had been what it was supposed to be when it was received and laden on board. Want of greater care in that behalf is not a fault, because the master had no knowledge or means of knowledge that the article required any extra care or attention beyond what is usual in respect to other goods. The proper precautions in respect to loss in the vessel, therefore, had been taken, if the goods had not been of a dangerous character, which was wholly unknown to the master or the owner of the ship, or his agents. But damage was occasioned, and loss and expense were incurred, and the only question is, Who must suffer? Where the owners of a general ship undertook that they would receive the goods, and safely carry and deliver them at the destined port, it was held in *Brass v. Maitland*, 6 El. & Bl. 481, that the shippers undertook that they would not deliver to be carried on the voyage packages of goods of a dangerous nature, which those employed on behalf of the ship-owner might not, on inspection, be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they were of a dangerous nature. Such was the principle laid down in that case, but the reasoning of the court in support of the rule is even more applicable to the present case. Although those employed on behalf of the ship-owner have no reasonable means, during the loading of a general ship, to ascertain the quality of the goods offered for shipment, or narrowly to examine the sufficiency of the packing

of the goods, the shippers, says Lord Campbell, have such means, and it seems more just and expedient that, although they were ignorant of the dangerous quality of the goods, or the insufficiency of the packing, the loss occasioned thereby should fall upon the shippers than upon the ship-owner. Accordingly, he held that the shippers, and not the ship-owners, must suffer, if, from the ignorance of the former, a notice was not given to the latter, which they were entitled to receive, and from the want of notice a loss had arisen, which must fall on either the shipper or the owner of the vessel.

Undoubtedly that rule, as is well contended by the libellant, rests upon the same principle as that which is applied in other commercial transactions of an analogous character. Where damage is sustained in a case not falling within the category of an inevitable accident, and neither party is in actual fault, the loss shall fall on him who, from the relation he bears to the transaction, is supposed to be possessed of the necessary knowledge to have avoided the difficulty. Baron Parke applied that rule in the case of *Gibson v. Small*, 24 Eng. L. & Eq. 40, with great force and vigor, in the case of a voyage policy, holding that the law did not regard exceptional cases, but wisely laid down a general rule, which is a most reasonable one in the vast majority of voyage policies, that the assured impliedly contracts to do that which he ought to do before the commencement of the voyage. Judge Sprague approved the rule, upon the ground that it ordained that the loss should fall upon the party who generally had the best means of informing himself as to the condition of the article to be shipped, which undoubtedly is the foundation principle on which the liability rests.

Were the rule otherwise, it might, as was well said by the district judge, encourage negligence, and even induce the general shipper or charterer to try experiments with articles unknown to commerce, at the expense of his ship-owner.

In view of the whole case, I am of the opinion that there is no error in the record. The decree of the District Court is accordingly affirmed with costs.

Young v. The Ship Orpheus. Lewis v. Same.

JOSEPH YOUNG v. THE SHIP ORPHEUS.
DANIEL LEWIS v. SAME.

A contract to furnish materials for the construction of a vessel, even where the same is built upon the shores of tide-waters, and designed for use upon the navigable waters of the sea, is not within the admiralty jurisdiction of the United States courts.

APPEALS in admiralty. Both suits were *in rem* to enforce on the ship Orpheus a lien arising under the law of the State, for materials furnished at the request of the builders, and in the construction of the vessel.

On the 6th of August, 1855, Mitchell and Rice contracted with the claimants, in writing, to build the ship, or the hull, including all iron-work and joiner-work, and also to furnish masts, spars, and blocks, including iron-work on the same and to the rigging, but not including rigging or copper sheathing. She was to be of certain specified dimensions, and was to be launched and delivered to the claimants by December 15 of the same year. The price for the vessel was \$45,000 equal to cash, in thirty days after she was launched and delivered to them in Boston. Of that sum \$30,000 was to be advanced, "as the ship progressed, and was to be paid out for materials and labor used in her construction." All of the materials constituting the claims of the respective libellants were furnished by them before the launch of the ship to Mitchell and Rice, the builders, and for the purpose of being used in building the same. Sixteen thousand six hundred feet of the lumber furnished by one of the libellants, and one thousand feet furnished by the other, were not used in the building of the ship, but, remaining in the yard after she was launched, were subsequently sold by the assignee in insolvency of the builders. The ship was built at Chelsea, was launched in February, and in March following sailed on a voyage to San Francisco.

The libels alleged that the materials and lumber were furnished on the credit of the ship; that by the laws of Massa-

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chusetts and of the United States the respective libellants had a lien upon the ship for the payment of the amount due, which in the first-named suit was alleged to be \$2,478.84, and in the second \$462.83. It was denied, in the answer, that the statements of the libels were true accounts of the claims for materials furnished in the constructing and launching of the ship.

Certain other defences touching the merits of the controversy were also set up by the claimants, but the view of the case taken by the court renders it unnecessary to make mention of them. The answers further set forth that at the time the vessel was seized by the marshal she was in the custody of the sheriff of the county, by virtue of an attachment made by him under process issuing from the State court, and it was denied that the subject-matter of the suits was one within the admiralty jurisdiction. The District Court sustained the objection to the jurisdiction arising from the alleged prior custody of the sheriff, and dismissed the libels.

E. F. Hodges, for libellant.

Was there ever a lien upon the ship in favor of the libellant? He furnished lumber, materials, &c., "to construct the ship," "by virtue of a contract" with a "person employed to construct her," and "money is due" therefor.

By the language of the State statute, c. 231, act 1855, the lien existed.

Hawes et al. had no lien on the ship. The statute lien is dissolved, unless a certificate, &c., is filed in the town clerk's office, &c., as per § 2, c. 231, acts of 1855; and they filed no certificate.

Hawes et al.'s attachment gives no notice of their lien; for all that appears, it is an attachment in an action of contract, which would give way before a lien process. *Forty Logs of Mahogany v. Richardson*, claimant, 2 Sumn. 589; *Travis v. Bishop*, 13 Met. 304; *Denney v. Lincoln*, 13 Met. 200; *Buttrick v. Holden*, 13 Met. 355.

The sheriff, by abandoning the ship, and having no keeper, lost

his hold upon the property ; it was then no longer, in the custody of the law. The process of the State court was no longer operative, and another jurisdiction could be exercised.

The attachment in the Hawes case was dissolved by a bond, and the sheriff abandoned the ship, leaving her in the possession of the marshal. There was clearly, then, no jurisdiction on the part of the State court. The bond is, "to pay the judgment, not to return the ship."

The Federal courts then took and had jurisdiction, by taking and holding possession of the *rem.* It must be remembered that the State court rendered judgment against Hawes *et al.* *The Oliver Jordan*, 2 Cur. 414.

The respondents have stipulated in this case, and in so doing waived all objection to the jurisdiction. The case is governed by the decision and reasoning of the court in the *Robert Fulton*, 1 Paine, 620 ; *The Young Mechanic*, 2 Cur. 404.

The Federal courts have jurisdiction to enforce such a lien.

Prior to the decision in *Steamship Jefferson v. Beers*, 20 How. 393, no doubt existed that the Federal courts had jurisdiction over cases of admiralty liens, however those liens may have arisen, or whatever authority may have created them.

The decision was followed by a repeal of the Twelfth Rule of Admiralty Practice, under which the country had for many years acted, and by the following cases : *Roach v. Chapman*, 22 How. 129 ; *Schooner Coernine*, 21 Law Rep. 343 ; *Morewood v. Enequist*, 23 How. 494.

These cases announce the following principles : that contracts for building ships are not necessarily maritime contracts, and therefore are not necessarily within the admiralty jurisdiction of this court ; that the admiralty law will not raise or create a lien in favor of the man who has furnished materials for building a ship in the absence of any local law.

These cases do not decide that when a lien has been fairly created upon a ship, the Federal courts have not jurisdiction to enforce such lien after the course of courts of admiralty. Nor can any such decision be found here or in any country, where admiralty law has authority.

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Prior to the decision of *The Jefferson v. Beers*, 20 How., such liens had been enforced by the Federal courts in many cases, and in every case where the question occurred the jurisdiction was recognized as undisputed.

Since the abolition of the Twelfth Rule, and the decision in *The Jefferson v. Beers*, the courts have sustained libels (commenced before the abolition of the Rule) to enforce liens created by the State laws. *Tipper v. Steamer St. Lawrence*, Cir. Ct. S. Dis. New York, Nelson, J.; *The Richard Busteed*, 21 Law Rep. 603.

The Federal courts have jurisdiction to enforce liens for the construction or repairs of ships, designed for navigating the high seas, however those liens may have been created.

By the Constitution, act 3, § 2, the judicial power of the United States extends to cases of admiralty and maritime jurisdiction.

The act of 1789, c. 20, § 9, confers upon the District Court "exclusive original cognizance of all original cases of admiralty and maritime jurisdiction."

The act of 1845 extends the admiralty jurisdiction of the District Courts to vessels of twenty tons' burden, at the time employed in commerce between ports of different States, upon the lakes and navigable waters between the same.

A contract to furnish materials for the construction of a ship, being built upon the shores of tide-water, and designed for use upon the navigable waters of the sea, is a maritime contract, and within the admiralty and maritime jurisdiction, as these words are used in the Constitution and acts of Congress.

The words "admiralty and maritime jurisdiction," as employed by the State and judicial authorities of this country, have an import much wider than they had in England, at the time of the separation of the Colonies from the mother country. They embrace nearly or quite as much as they did under the civil law. *Read v. Hall of a New Brig*, 1 Story, 244; *Hall of New Ship*, 2 Car. 414; *The Sandrick*, 1 Pet. Adm. 233; *Young Mechanic*, 2 Car. 404; Marine Ord. tit. 2, art. 1: *A New Brig*, Gilpin, 473.

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A contract to build a ship was always maritime *ex vi termini*, both in England and in those countries of Continental Europe governed by the civil law. *The Jerusalem*, 2 Gall. 349; *Ross v. Walker*, 2 Wils. 265.

Some decisions have been made in this country, in which such contracts have been held not to be maritime; but it is believed they were either cases *in rem*, where no lien existed, and of course no jurisdiction *in rem* could be maintained, or they were contracts for the construction of vessels not designed for use upon waters over which the admiralty jurisdiction extends. *De Lovio v. Boit*, 2 Gall. 475; *Jerusalem*, 2 Gall. 347; *Propeller Charles Mears*, 1 Newb. Adm. 202; *Roach v. Chapman*, 22 How. 129; *Davis et al. v. A New Brig*, Gilpin, 473; *Hull New Brig*, 1 Story, 244.

The fact that a maritime lien exists upon a ship within the ebb and flow of the tide, gives this court jurisdiction, without reference to the authority under which the lien is created.

It is admitted that a State legislature cannot give jurisdiction to a Federal court. But it can create a right in a thing over which the Federal court has, by other and legitimate authority, jurisdiction.

The fact that the law creates a maritime lien upon the ship, out of the contract between the material man and the builder (the ship being for use upon waters within the admiralty jurisdiction), makes that contract itself maritime.

The lien created by the statute of Massachusetts is a maritime lien.

A maritime lien is a *jus in re*, as distinguished from a *jus ad rem*, and, as such, may be enforced in a court of admiralty. *The Young Mechanic*, 2 Cur. 404.

E. H. Derby, for claimants.

The contract declared on is not a maritime contract, and the court will not take jurisdiction.

It is a contract to be performed on land. It is for the plank furnished to a ship before launching, before she touched salt water. See *Ferry Co. v. Beers et al.*, 20 How. 399.

The statutes of a State cannot confer jurisdiction on the

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United States courts; they derive their jurisdiction from the Constitution and laws of the United States, and in admiralty are confined to purely maritime contracts. *Maguire v. Card*, 21 How. 249; *Allen v. Newberry*, 21 How. 246.

Jurisdiction in admiralty cases is restricted to the power possessed by Congress to regulate commerce with foreign states, which does not extend to those internal concerns that are completely within a particular State, when they do not affect other States. *Gibbons v. Ogden*, 9 Wheat. 194.

In the case of *Allen v. Newberry*, a steamer bound for Illinois to other States took goods from port to port in Wisconsin. *Held*, that a suit in admiralty would not lie. See *Roach v. Chapman*, 22 How. 129.

Any former *dicta* or decisions which seem to favor a contrary doctrine were overruled by this court in the case of *Ferry Co. v. Beers et al.*, 20 How. 400. See also *Peyroux v. Howard*, 7 Pet. 343, and *Steamboat Orleans v. Phœbus*, 11 Pet. 183.

The duty of the courts of the United States is to take notice of the want of jurisdiction, even where it has been waived by the parties, and without waiting for an objection from either side, when the proceedings in the District Court show a want of jurisdiction. *Cutler v. Rae*, 7 How. 731. *The Bee*, Ware, 336.

The Twelfth Rule last adopted does not protect the claim of the libellant. It protects only claims of a purely maritime character, such as for repairs of ships in domestic ports, to which a lien attaches by a State law.

The change of Rule Twelfth, which omits the former license to proceed *in rem*, in case of domestic ships, for repairs and supplies, as under the old rule, but puts the rule in force from May, 1859, preserves the suit *in rem* in contracts purely maritime, as for repairs, but does not apply to contracts to be performed on land, as for building a ship.

The case of *Roach v. Chapman*, 22 How. 129, is directly in point.

A contract to build a ship is not a maritime contract. See *Ferry Co. v. Beers et al.*, 20 How. 399. In *Roach et al. v. Chapman*, the court say: "A contract for building a ship is

clearly not a maritime contract." In the case of *Morewood v. Enequist*, 23 How. 494, the court say: "The court decided in that case (*Ferry Co. v. Beers et al.*) that a contract to build a ship is not a maritime contract."

The United States courts have no jurisdiction over this case, under that provision of the Constitution which gives Congress power to regulate commerce with foreign nations and between the several States of the Union.

The lien given rests upon an artificial structure, and depends upon a local statute, which must be strictly followed and construed. *Green v. Ely*, 2 Greene, 408; *Lynch v. Cronan*, 6 Gray, 532.

The lien rests on two statutes of Massachusetts, — c. 117 Rev. Stat. combined with c. 231 of acts of 1855. The prerequisites of these statutes have not been complied with.

Act of 1855, c. 231, § 2, requires the claimant, within four days from the time that the vessel leaves the port where she was when the materials were delivered, to file a certificate with the town clerk.

The seizure made by the marshal was invalid, and gives no jurisdiction to this court. Nor is it helped by the stipulation.

A mechanic who proceeds under the lien law of New York against owners, for work done under contractors, cannot recover if nothing be due to the latter on their contract. *Pike v. Irwin*, 1 Sandf. 14.

CLIFFORD, J. It is insisted by the libellants that on this state of facts the Federal courts have jurisdiction to enforce the lien under the State law. They in effect admit that to maintain that view of the case it is necessary to show that a contract to furnish materials for the construction of a ship is a maritime contract, and they accordingly submit the affirmative of that proposition, and insist that all such contracts are maritime, especially where the ship is to be built upon the shores of tide-waters, and is designed for use upon the navigable waters of the sea. Maritime contracts are such as relate to commerce and navigation, and unless a contract for the building of a ship is to be regarded as a maritime contract, it will hardly be contended that a contract

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to furnish the materials for the construction of the same can fall within that designation, as the latter is more strictly a contract made on land and to be performed on land than the former, and is certainly one stage further removed from any immediate and direct relation to commerce and navigation.

On the other hand, if it be admitted that a contract to build a ship is a maritime contract, it is difficult to say that a contract to furnish the materials for the construction of the same is not also of the same character, although its breach and even its performance may involve judicial inquiries into the business transactions of men, as well in the forests and mines, as in the manufactories and workshops of the country.

Consequently, wherever the question involved in the record has been considered, the decision has uniformly turned upon the solution of the inquiry, whether a contract for building a ship is or is not a maritime contract. The parties in this controversy have conducted the investigation in the same way, and very properly, because it is clear that if a contract for building a ship is not a maritime contract, then this court has no jurisdiction of the matters involved in the cases under consideration. Beyond question the Supreme Court is the ultimate tribunal, under the Constitution of the United States, to construe both the constitutional grant of judicial power in cases of admiralty and maritime jurisdiction, and the acts of Congress regulating its exercise. Decisions of the Supreme Court, therefore, are final and conclusive upon the subject. Such a decision is an authority in this court, and of course will be followed even in cases where the present circuit judge is not able to yield his assent to the conclusion. Allowing the rule to be so, it is insisted by the claimants that the question involved in the controversy has been several times conclusively decided in that court, and they refer to the cases upon which they rely to support that proposition. But the libellants deny the proposition, and insist that no one of the cases referred to fully decides the point under consideration. Some care must be observed, under the circumstances, in examining those cases, and the more so, as two of the District Courts, in respect to one of them, have come to opposite conclusions as

to the proper construction to be given to the opinion of the court. Reference is made, in the first place, to the case of *The Jefferson*, 20 How. 393, in which the opinion of the court was given by Mr. Justice Catron. Recurring to the statement of the case, it will be seen that it was a libel filed by the assignees of the builders against a new steam ferry-boat, for a balance due the builders on account of work done and materials furnished in constructing the hull of the vessel. The builders contracted to build three ferry-boats at Keyport, in the State of New Jersey, but they built this one only, and they claimed a lien for the unpaid balance of the price.

Decree was entered in their favor in the court below, and the claimants appealed to the Supreme Court. When the cause came up for argument, the first point made for the claimants was, that a contract to build and complete a ship is not one within the admiralty jurisdiction of the Federal courts, though it be intended to employ her in navigating the ocean, and even though the employer be a citizen or inhabitant of some other place or country than that in which the work is to be done. Direct issue was taken upon that proposition by the libellants, and the court say: "The only matter in controversy is whether the District Courts have jurisdiction in admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends." Notice was taken in the argument of the fact that the State law in that case gave no lien in favor of the builder, but the main point urged for the claimants was that the building of a ship was purely a local matter in no way directly connected with maritime commerce.

Responding to that argument, the court say: "The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation." Applying that rule to the case then under consideration, the court say: "So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a

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contract made on land to be performed on land." Effort is certainly required to misunderstand that language ; but the court go further, and say, the wages of the shipwrights had no reference to a voyage to be performed. They had no interest or concern whatever in the vessel after she was delivered to the party for whom she was built, and they were bound to rely on their contract.

Looking at the whole case, I am of the opinion that the Supreme Court in that case decided, and intended to decide, that a contract for the building of a ship is not a maritime contract. Judge Wilson took the same view of the question in the case of *The Revenue Cutter*, 21 Law Rep. 284 ; but Judge Sprague, in the case of *The Richard Busteed*, 21 Law Rep. 601, held that a contract for the building of a sea-going vessel was maritime, and came to the conclusion that the contrary opinion, expressed in the case of *The Jefferson*, might be regarded as the reasoning or dictum of the judge who delivered the opinion. Since the last-named case was decided, the same question has more than once come before the Supreme Court, and on every occasion the decision has been that such contracts are not maritime. Such was the view of the court in the case of *Roach et al. v. Chapman et al.* 22 How. 129, where the opinion of the court was given by Mr. Justice Grier. Proceedings had been instituted in the District Court for the Eastern District of Louisiana, in that case against *The Steamer Capitol*, to enforce a lien for a part of the price of the engine and boilers, which had been furnished at Louisville, in the State of Kentucky, where she was built. Libellants claimed a lien under the general admiralty law and under the law of the State. Plea was filed to the jurisdiction of the court, and the court say, a contract for building a ship or supplying engines, timber, or other material for her construction, is clearly not a maritime contract, and that any former dicta or decisions which seemed to favor a contrary doctrine were overruled by this court in the case of *The Jefferson*, 20 How. 400. During the same session of the court, the same question was again presented in the case of *Morewood et al. v. Enequist*, 23 How. 494, and was again decided in the same way. On that occasion

the court, after referring to the case of *The Jefferson*, go on to say that the court decided in that case that a contract to build a ship is not a maritime contract; and though in countries governed by the civil law, courts of admiralty may have taken jurisdiction of such contracts, yet that in this country they are purely local, and governed by State laws, and should be enforced by the state tribunals. Regarding these decisions as authority in this court, it is not possible to sustain the views of the libellants in these cases.

Contracts for repairs and supplies are maritime contracts, and it is for that reason that libels for such claims, if furnished to a foreign ship or for a ship in a foreign port, may be filed against the ship and freight *in rem*, or against the master or owner *in personam*. Libels *in rem* in such cases are based upon a maritime lien, which arises as an implication of law. Such implication, however, does not arise in cases of domestic ships, but under the old admiralty rule the like proceeding *in rem* was allowed in such cases where a lien was given by the local law. Suits *in personam* may still be prosecuted in such cases under the new admiralty rule, but not *in rem*, as under the previous rule.

Pending cases or such as were brought before the 1st of May, 1854, when the new rule went into operation, are unaffected by the repeal of the old rule. *The Steamer St. Lawrence*, 1 Black. 522. Explanations touching the repeal of that rule and the effect of that repeal are so fully given in the case last referred to, that it seems unnecessary to say more upon the subject, especially as neither the old nor new rule has any application to the case under consideration.

It was suggested at the argument that the objection to the jurisdiction had been waived, but it is the settled doctrine of the Federal courts that consent cannot give jurisdiction, nor can the objection be waived. *Cutler v. Rae*, 7 How. 731. Having come to the conclusion that the objection to the jurisdiction of the court must prevail, it is unnecessary to examine the other question. The respective decrees of the District Court dismissing the libels are affirmed, but without costs.

STEPHEN S. TOBEY v. NEHEMIAH LEONARD *et al.*

Where the allegations of the answer are directly responsive to the bill, courts of equity cannot decree against such denials of the respondents, on the testimony of a single witness.

The rule is universal that the complainant in such a case must have two witnesses, or one witness and corroborative circumstances, or he is not entitled to relief.

The complainant, calling upon the respondent to answer an allegation, admits the answer to be evidence; and if it is testimony, it is equal to the testimony of any other witness.

Where the complaining party parts with the title, and it passes from him to the respondent, the rule admitting extraneous evidence to show the real character of the conveyance may apply; but it has no application to a contract to convey land, or to an agreement to give a bond or written instrument to convey the same, in cases where the party to be charged derived his title from a stranger.

In a suit to compel performance of an alleged oral agreement to convey lands, not purchased by respondent of the complainant, *held*, that evidence to show that the complainant or his grantor had a right to redeem certain parcels of the land was inadmissible, under the pleadings, the bill confessedly not being one for redemption.

THIS was a bill in equity brought to enforce a trust in lands.

Jonathan Tobey, the father of the complainant, being the owner of certain real estate situated in New Bedford, and known as his homestead farm, on the 28th of January, 1830, conveyed the same in mortgage to one William Rotch, to secure a debt of \$5,000, and being also the owner of certain other real estate in New Bedford and Acushnet, he conveyed this in mortgage, and also the real estate previously mortgaged, to Stephen S. Tobey and his brother Leonard W., to secure an indebtedness of \$6,000. Subsequently the brother of the complainant conveyed to him all his interest in the mortgage, and the debt secured thereby. Jonathan Tobey having failed to meet the condition of the mortgage to William Rotch, the mortgagee, on November 28, 1849, entered and took possession of the premises for breach of the condition, and for the purpose of foreclosing. Notwithstanding the foreclosure, the mortgagor continued in the occupancy of the premises as tenant at will of the mortgagee, during his lifetime, and, after his decease, as tenant at will of his legal representatives, until some time during the year 1858 or 1859, when the title having passed out of the mortgagor, by foreclosure, those interested brought ejectment to obtain possession.

The bill alleged that, pending that suit, the owners having expressed a willingness to sell the premises to the defendant in that suit for less than the original mortgage debt, and less than the value, he, the defendant in that suit, applied to the respondent, Horatio Leonard, who had married his daughter, to procure the money for him of his father, Nehemiah Leonard. They proposed to ascertain the lowest price at which the homestead could be purchased, and afterwards informed him that it could be obtained for \$2,500, by their giving two notes payable in twelve months, one to be signed by Nehemiah Leonard for \$2,200, and the other by Horatio for \$300. Certain suggestions were made at the time by Nehemiah Leonard, as to cutting wood from the real estate as a means of paying the notes to be given for the purchase-money. Both the complainant and his father were informed by the parties that the senior Leonard would be unwilling to assist in the matter without other security besides the farm included in the mortgage; that he would require the mortgagor and the complainant to convey all their interest in all their real estate before referred to; and they consented to those terms upon the condition that a bond or written agreement should be given back specifying the terms of the agreement under which the conveyances were executed, and upon the payment of what sum a reconveyance of all the real estate should be made. Deeds of quitclaim were accordingly prepared, conveying to Horatio all the interest which the grantors had in all the before-mentioned real estate, and the same were duly executed and handed to the grantee, with the expectation, on the part of both grantors, that the agreement to reconvey all said real estate upon the payment of the \$2,500, &c., would be given when Horatio or Nehemiah obtained a deed of the homestead. As additional security, and at the request of Horatio, Jonathan Tobey afterwards gave him a bill of sale of all his stock and farming utensils, and carriages, and on March 3, 1860, Nehemiah and Horatio purchased the farm included in the mortgage to William Rotch, by giving their notes in the amount and for the time before stated, and the farm was conveyed to Horatio, who, on June 12, 1860, conveyed the same to Nehemiah. Further, the

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complainant averred that neither he nor the said Jonathan could obtain from the said Nehemiah any agreement in writing showing how he held the real estate, and that, upon application to him for that purpose, his answer was that when the notes were paid he would make it all right; that in July, 1860, he purchased of the said Jonathan, by deed and bill of sale, all the real estate before referred to, and all his right to have the same conveyed to him, under the agreement, together with all his interest in the stock, farming utensils, &c., for \$5,500. and on August 2d he tendered to said Nehemiah the sum of \$2,640, and to said Horatio \$370, being the respective amounts of their notes and interest, and a reasonable sum to each for their time, and requested Nehemiah to convey to him, the complainant, all the aforesaid real estate, and requested them, or such one of them as had the title under the bill of sale, to convey the stock, farming utensils, and carriages, but each of them refused so to do.

Fraudulent combination to deprive him of his rights was then charged upon information and belief. The bill further set up that said Nehemiah alleged that he had conveyed the real estate to Rodolphus and John Ashley, and they to Henry Spooner and Joshua B. Ashley, but that the grantees had at the time knowledge of the complainant's rights and claim: that the conveyance made by him and his grantor to Horatio and Nehemiah were without consideration, and were made solely to secure the notes given for the purchase of the farm: and that the understanding was that the complainant and his grantor should remain in possession, and that the cutting of wood to raise money to meet the notes should be done by him and the complainant, and that they had accordingly remained in possession.

The bill prayed for a decree that respondents should convey the real estate, stock, &c., to complainant upon the performance by the complainant of what devolved upon him under the agreement, for compensation for wages, and for an injunction.

N. Burdett and D. Pherson, for complainant.

It is true that when the defendant in express terms, upon his own knowledge, negates the allegations in the bill, the oath of one witness is not sufficient to convict such defendant. But the oath

of one witness when supported by any corroborative circumstances which give a preponderance in his favor is sufficient; and the preponderance in this case is overwhelming. 2 Daniels, Ch. Pr. (Perkins's Am. ed.) 985; Adams's Eq. 145; 1 Greenl. Ev. § 260.

The defendants also set up as a bar to this suit the statute of frauds, and alleged that the complainant cannot prevail, because neither the agreement for which the suit is brought, nor any memorandum or note of it, is in writing, signed by the party to be charged therewith.

The decisions of this circuit and of the Supreme Court clearly take this case out of the operation of the statute, and the question raised can no longer be considered an open one. *Eldridge v. Jenkins*, 3 Story, 181; *Babcock v. Wyman*, 19 How. 289; *Russell v. Southard*, 12 How. 139; *Morris v. Nixon*, 1 How. 126; *Taylor v. Luther*, 2 Sumn. 228.

The doctrine that part performance will take a case out of the statute of frauds is well settled and recognized everywhere. 2 Story's Eq. §§ 759-761, 1522.

The next question is, are John S. and Rhodolphus Ashley *bona fide* purchasers, without notice, within the principles of a court of equity?

It is a well-settled rule that whatever is sufficient to put a party on inquiry is good notice. Where a man has sufficient information to lead him to a fact, he is put upon inquiry, and shall be deemed cognizant of it. *Pritchard v. Brown*, 4 N. H. 397, 404, 405; *Flagg v. Mann*, 2 Sumn. 554, 555; *Carr v. Hilton*, 1 Cur. 390, 393.

B. F. Thomas and *R. Olney*, for respondents.

Did the whole estate owned by Jonathan Tobey in 1830 pass under the mortgage to Rotch? *Melvin v. Locks and Canals*, 5 Met. 15, 29, 30; *Thacher v. Howland*, 2 Met. 41, 44, note; *Wheeler v. Randall*, 6 Met. 529; Shep. Touch. 78, 93; 3 Greenl. Cruise, 267, 269-271. See *Kendall v. Brown*, 7 Gray, 210; *Johnson v. Simpson*, 36 N. H. 91.

The land involved in this suit lying in Massachusetts, the title to it can be acquired and lost only in the manner prescribed by

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the law of the place where the land is situate. *United States v. Crosby*, 7 Cran. 115; *Kerr v. Moon*, 9 Wheat. 565; *M' Cormick v. Sullivan*, 10 Wheat. 192; *Darby v. Mayer*, 10 Wheat. 465; *Hosford v. Nichols*, 1 Paige, 220; Story's Conf. of Laws, §§ 363 - 373, 424, *et seq.*; *Cutter v. Davenport*, 1 Pick. 81; Whea. Elements Inter. Law, 116; *Jeter v. Fellowes*, 32 Penn. 465; *Nicholson v. Leavitt*, 4 Sandf. 252, 276.

And by the General Statutes of Massachusetts, c. 100, § 20: "No such trust (i. e. concerning lands), whether implied by law or created or declared by the parties, shall defeat the title of a purchaser for a valuable consideration, and without notice of the trust; nor prevent a creditor, who has no notice of the trust, from attaching the premises, or taking them on execution, in like manner as if no such trust had existed."

The "notice" required under this section of the General Statutes, to defeat a purchaser's title, is actual notice, because the following section (§ 21) declares that the recording of an instrument of trust in the registry of deeds for the county "shall be deemed equivalent to actual notice," &c.

It cannot reasonably be supposed that the registration authorized in section twenty-one was meant to be equivalent to anything but the same notice required in section twenty; i. e. "actual notice." The two sections are to be construed together; and as to the meaning of the word "notice," employed in section twenty, section twenty-one operates by way of limitation and definition.

If by notice in section twenty had been intended both actual and constructive notice, there would have been no propriety in subsequently enacting that one form of constructive notice (namely, registration) should be equivalent to actual notice, when all constructive notice was so equivalent.

But, in Massachusetts, it has always been the law, independently of any express statute provision, that a recorded deed could be affected or defeated by a prior unrecorded deed, only when the subsequent grantee has actual notice of the prior conveyance; and that mere possession or other constructive notice will not produce that result. *Norcross v. Widgery*, 2 Mass. 509; *M'Mechan v. Griffing*, 3 Pick. 148; *Lawrence v. Stratton*, 6 Cush.

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163, 167 ; *Hennessey v. Andrews*, 6 Cush. 170 ; *Houghton v. Bartholomew*, 10 Met. 138 ; *Curtis v. Mundy*, 3 Met. 405.

Any other construction of these sections than that contended for would produce the anomalous result of placing executory contracts, resulting in mere equities, on a better footing than those rights or estates which have been perfected with all the forms and solemnities known to the common law ; and would give the holder of an equitable mortgage, or of an equity growing out of a contract of sale, and not recorded, a superiority over subsequent creditors and purchasers, which would be denied to a mortgage or a sale consummated by a conveyance, unless placed on record.

Possession will not operate as notice if explained, and if it is fully shown by the accompanying circumstances, or otherwise, to be consistent with the conveyance which is assumed to be made ; and, in this case, the continued occupation of the estate by the Tobey's could not operate as notice, because entirely explained by the attendant circumstances. *Rogers v. Jones*, 8 N. H. 264 ; *Williamson v. Brown*, 15 N. Y. 354 ; *Cunningham v. Buckingham*, 1 Ohio, 264 ; *Cook v. Travis*, 22 Barb. 338, 359 – 361 ; *Butler v. Stevens*, 26 Me. 484 ; *Bell v. Twilight*, 22 N. H. 500 ; *Billington v. Welsh*, 5 Binn. 132 ; *Flagg v. Mann*, 2 Sumn. 554 – 557 ; *McMechan v. Griffing*, 3 Pick. 149 ; *Hewes v. Wiswell*, 8 Me. 94 ; *Holmes v. Stout*, 2 Stockt. Ch. 419 ; *Nutting v. Herbert*, 37 N. H. 346.

The quitclaim deeds of the two Tobey's having been put on record, they are estopped from relying upon any mere continuance in possession as notice of any remaining rights or equities in themselves. Nehemiah Leonard and the other defendants were not bound to go beyond these publicly recorded declarations. They had a right to presume the Tobey's possession to be consistent with their conveyances, and that they were mere tenants at will or by sufferance to their grantee, Horatio Leonard. *Scott v. Gallagher*, 14 S. & R. 333 ; *Wood v. Farmere*, 7 Watts, 382 ; *Newhall v. Pierce*, 5 Pick. 450 ; *New York Life Ins. Co. v. Cutler*, 3 Sandf. 176. See *White v. Wakefield*, 7 Sim. 401 ; *Bayley v. Greenleaf*, 7 Wheat. 46, 51 ; *Plumer v. Robertson*, 6 S. & R. 179 ; *Cook v. Travis*, 22 Barb. 338, 359 – 361.

As to constructive notice to Nehemiah Leonard of the Tobeys' rights (if it shall be held that any constructive notice would avail), it is manifest, that, to charge Nehemiah Leonard with constructive notice, is at variance with the whole theory of the complainant's case, with the allegations of the bill, and the testimony of Jonathan Tobey.

But further, constructive notice of any right of redeeming the farm in either of the Tobeys can be fixed upon Nehemiah Leonard only upon the ground of continued possession of the Tobeys, or of their complaints against Horatio Leonard, made after his purchase, and communicated to Nehemiah.

These complaints, however, cannot operate as constructive notice to Nehemiah Leonard, because it is shown by evidence reliable and not contradicted, that he once investigated them, went to see Jonathan Tobey on account of them, and learned from him that the sole cause of the complaints was Horatio's mode of disposing of the wood. *Holmes v. Stout*, 2 Stock. Ch. 419.

Moreover, Horatio Leonard had also given him the most positive assurances that the Tobeys had not asked, nor had he promised, any sort of right or interest in the farm to the Tobeys, or either of them. *Jones v. Smith*, 1 Hare, 43; *Buttrick v. Holden*, 13 Met. 355; *Rogers v. Jones*, 8 N. H. 264.

Nehemiah Leonard paid the price for the farm simultaneously with its being conveyed to him. By force of the agreement indorsed on the schedule of debts, as well as by the agreement with the creditors, he immediately became bound to the specified creditors of Horatio Leonard to the amount of their respective claims. He thereby appropriated the purchase-money beyond the power of revocation; and so pledged himself in respect of it to third parties, that he could not resist paying it to them upon their demand. *Frost v. Beekman*, 1 Johns. Ch. 288; *Jewett v. Palmer*, 7 Johns. 65. See *Gilday v. Watson*, 5 S. & R. 267; *Boggs v. Varner*, 6 W. & S. 469; *Ward v. Lewis*, 4 Pick. 518; *Bryant v. Russell*, 23 Pick. 508; *Carnegie v. Morrison*, 2 Met. 381; *Frost v. Gage*, 1 Allen, 262.

If Nehemiah Leonard had no notice of the trust, then the

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Ashleys, his grantees, cannot be affected by it. *Lowther v. Carleton*, 2 Atk. 242; *M^cQueen v. Farquhar*, 11 Ves. Jr. 467, 478; *Trull v. Bigelow*, 16 Mass. 406; *Boynton v. Rees*, 8 Pick. 329; *Mott v. Clark*, 9 Barr, 399; *Lacy v. Wilson*, 4 Munf. 313.

And they did not make their purchase without diligent inquiry, in the usual course, as to the state of the title, and not till after consultation with counsel. See *Jackson v. Van Valkenburgh*, 8 Cow. 260; *Bellas v. M^cCarty*, 10 Watts, 26; *Wilson v. M^cCullough*, 23 Penn., 440; *Barnhart v. Greenshields*, 28 Eng. L. & Eq. 77, 85; *Jolland v. Stainbridge*, 3 Ves. Jr. 478; *Butler v. Stevens*, 26 Me. 484; *Kerns v. Swope*, 2 Watts, 78; *Epley v. Witherow*, 7 Watts, 163, 167; *Woods v. Farmere*, 7 Watts, 382, 387.

The agreement set out in the complainant's bill is within the Statute of Frauds of Massachusetts, and within the statute regulating the creation of trusts. Gen. Stats. c. 105, § 1; Gen Stats. c. 100, § 19; *Boyd v. Stone*, 11 Mass. 342.

By the law of Massachusetts, we respectfully submit, since these lands lie in Massachusetts, this cause must be determined.

The contract sought to be enforced by the bill is within the letter, and within the reason and sound policy, of the Statute of Frauds, — a statute whose provisions bind courts of equity equally with courts of law.

The case, as stated in the bill, does not fall within the cases cited. The most important are, *Babcock v. Wyman*, 19 How. 289; *Eldredge v. Jenkins*, 3 Story, 181; *Taylor v. Luther*, 2 Sumn. 229.

CLIFFORD, J. Some care is required in the examination of the allegations, setting forth the supposed grievances of the complainant, in order clearly and fully to understand the real nature of the claim presented in the bill of complaint. Confessedly it is not a bill to redeem, as is manifest from a single reading; and no pretence of the kind was set up at the argument. Neither the complainant nor his grantor had any interest, absolute or defeasible, in the homestead farm, at the time the same was purchased by Horatio Leonard of the legal representatives of William Rotch. Nothing of the kind is pretended; and, if the pretence

were made, it could not be supported for a moment, as the bill of complaint alleges, and the whole evidence shows, that the title had then passed out of the mortgagor by foreclosure. Foreclosure of that mortgage gave the mortgagee a perfect title in fee-simple absolute, as it was prior in date to the one given to the complainant and his brother. Title to the homestead farm, therefore, was acquired by the respondent from those who owned the land in fee-simple; and no interest therein, either absolute, equitable, or contingent, belonging to the complainant or his grantor, passed to the said respondent by virtue of that deed. The right of redemption in the mortgagor under the mortgage to William Rotch was gone, and the title had become absolute in the legal representatives of the mortgagee. The former ownership, under the circumstances, really amounts to nothing; but the case must be considered precisely as it would be if the mortgagor had never owned the premises. All the negotiations for the purchase were made by the respondent, who became the grantee in the deed, and he secured the consideration by giving his own note and that of his father; and he has since paid the amount of the consideration, without resort to any funds derived from the complainant or his grantor. They furnished no funds to make the purchase, and it is not alleged in the bill of complaint that the grantee in the deed agreed to purchase the land in any other name than his own. Looking at the case, therefore, as stated in the bill of complaint, it is obvious that the grantee in that deed took a title in fee-simple, subject to the legal and equitable operation of the alleged oral agreement to convey the land to the complainant and his grantor upon the terms and conditions therein prescribed. Keeping these explanations in view, the next important consideration is to observe the exact terms of agreement upon which, so far as respects the homestead farm, the rights of the complainant and his grantor depend, as alleged in the bill of complaint. The terms of the agreement were, "that a bond or written agreement should be given back, specifying the terms of the agreement under which the conveyances were executed, and upon the payment of what sum a reconveyance of all the real estate should be made." Taking the lan-

guage of the bill of complaint which precedes the statement of the agreement in connection with what follows, and it is evident that the complainant intends to allege, and does, in fact, allege, that, according to his understanding of the agreement and that of his grantor, the conveyance back to them was to be made upon the payment of the notes given for the purchase-money and interest, and a reasonable sum for the services of the purchaser. Clearly, therefore, the case stated in the bill of complaint is, that one or both of the principal respondents agreed to purchase certain lands of a third person, and to give to the complainant and his grantor a bond or written agreement to convey the same to them, upon the payment of certain sums of money; and that they have refused to execute and deliver the bond or written agreement, or to convey the land. Confining attention to the claim for the homestead farm, and leaving out of view for the present the claim that two parcels of land were embraced in the quitclaim deeds which do not belong to the homestead, the explanations already given show the true and exact nature of the controversy involved in this suit, which may be reduced to a single proposition. Complainant alleges, that one or both of the principal respondents, prior to the 3d of March, 1860, or on that day, agreed with him and his grantor to purchase a certain tract of land, described as the homestead farm of his grantor, and to give back to them a bond or written agreement to convey the same to them, upon the payment of the purchase-money and interest, and a reasonable compensation for their services, and that they have refused to give back the bond or written agreement, or convey the land, although they have purchased the land; and the complainant and his grantor have tendered the money according to the agreement, and are in no way delinquent in regard to the same. Denial is made by the respondents of every branch of the proposition; and they insist that, if it were fully proved, it would not entitle the complainant to relief under the prayers set forth in the bill of complaint. Matters of fact, under the circumstances, must first be considered; for, unless the complainant has proved the material allegations of his bill of complaint, he cannot be entitled to relief. Separate answers are

filed by the respondents ; and, upon an examination of the allegations, it appears that those filed by the two principal respondents are directly responsive to every material allegation in the bill of complaint. Take, for example, the answer filed by the respondent who purchased the homestead, which is the branch of the controversy under consideration. Responding directly to the allegations of the bill of complaint, he expressly denies the whole foundation of the complainant's claim. He denies, among other things, that the owners of the homestead farm ever expressed a willingness to sell the same to the complainant or his grantor for a sum less than the mortgage debt, or less than its value ; or that the complainant or his grantor ever applied to him to procure money for them from his father to purchase the farm, or for any purpose ; or that he and his father, or either of them, ever engaged to ascertain for them the lowest price at which the farm could be purchased, or to make any inquiries upon the subject for their benefit ; or that they, or either of them, ever informed those parties that they could or would purchase the premises on their account or to their use ; or that any such suggestion as is alleged, as to cutting wood as a means of raising money to pay the notes, was ever made by them, or either of them ; or that they, or either of them, ever promised or suggested that his father would be unwilling to assist them, without such further security as is alleged in the bill of complaint ; or that the complainant or his grantor ever, in any way or at any time, ever said or suggested that any bond or written instrument of any kind whatsoever should be given back, stating or suggesting that a reconveyance should ever be made of the premises ; and he expressly alleges that no bond, or other written instrument or writing for a conveyance or reconveyance, was ever named or suggested to him, except as made in the bill of complaint. Equally explicit, also, are the denials in the answer of the other principal respondent. Such denials, to the extent that they relate to facts within the knowledge of the respondent, and are responsive to the allegations in the bill of complaint, must be received as evidence. Courts of equity cannot decree against such denials, in the answer of the respondent, on the testimony

of a single witness. On the contrary, the rule is universal, that, under such circumstances, the complainant must have two witnesses, or one witness and corroborative circumstances, or he is not entitled to relief. That rule stands upon the reason, that, when the complainant calls upon the respondent to answer an allegation, he admits the answer to be evidence; and, if it is testimony in the case, it is equal to the testimony of any other witness; and, as the complainant cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance. *Clarke's Ex'r v. Van Riemsdyk*, 9 Cran. 160; *Hughes v. Blake*, 6 Wheat. 468.

Much reliance is placed by the complainant upon the testimony of his father, who is his grantor of one half the interest claimed, as before explained. His testimony respecting the circumstances attending the purchase of the homestead farm from the heirs of William Rotch is very explicit, and is given at great length. He states, that he learned from Horatio Leonard and his father, during the pendency of the ejectment suit, that the heirs would sell the property for \$2,500; that he and the complainant applied to his son-in-law to help them to the money; but he said he would not, unless his father would assist. Whereupon, the witness states, he applied to the father, and that he agreed to grant the assistance, if the heirs would take his notes on twelve months, and the witness and the complainant would pay them when they fell due; that he agreed to those terms. Speaking of the conversation, the witness states that it took place at the house of his son-in-law; that he and the father of his son-in-law were alone. "Nobody else [was] in the room, and the door was shut." When he went away he remarked, that if the heirs would accept \$2,500, and take his notes, and if the complainant and the witness would take care of the notes, he would give them, but that he must be secured on the land. His son-in-law came to him that evening, and told him that he and his father had had a conversation with one of the heirs upon the subject, and that it was agreed that his father should give his note for \$2,200, and that he, the son-in-law, should give his note for

\$ 300, both payable in twelve months ; and that the heirs should give a bond for a deed of quitclaim, on the payment of the notes. Confirmatory circumstances are then stated by the witness, corresponding substantially with the allegations in the bill of complaint ; and, after concluding that relation, he adds that his son-in-law came back alone from the visit to the heirs, and gave him the information before stated, and said, that he would have the papers made all right, including a statement of what the agreement was between the witness and the father of his son-in-law. Directions, however, were given by the witness, to his son-in-law, to go to the office of his attorney, who had charge of the ejectment suit, and have the papers prepared ; and in a day or two, at the request of his son-in-law, he went to the office of his attorney, and signed a deed, without reading it, or knowing what was in it, and went out, leaving the complainant there with his son-in-law and his attorney. In answer to another interrogatory, he states that it was agreed between him and Nehemiah Leonard, at the interview between them, in the house of his son-in-law, that he was to have a writing, to show what the understanding was ; and he states that the same thing was talked over between him and Nehemiah and Horatio together that same afternoon, and it was agreed that he should have such a writing. Particular mention is also made of a conversation between the complainant and Nehemiah Leonard, in which he states in substance and effect, that the respondent said that all he wanted was the money to meet the notes, and that he took hold of the transaction to help the complainant. Several other conversations with one or the other or both of these respondents are given by the witness, in which, as he states, they substantially admitted that he was to have the agreement for a conveyance. On cross-examination, he admitted that he suggested to the complainant to buy out the farm, and take the fight with the Leonards ; and that he stated to him, at the same time, that he should be a witness for him, if he brought a suit. Circumstances of a confirmatory character are also adduced by the complainant ; and they were earnestly urged upon the consideration of the court at the argument, and will be briefly noticed at the present time. Reference

is made to the bill of sale of the personal property ; but there is no evidence to show a delivery, or that one article of it ever went into the possession of the grantee ; and the clear inference from the case is, that it was made for some other purpose. Certain witnesses also testify to various conversations with one or the other of the principal respondents ; but there is not one of the conversations that has much tendency to prove the alleged agreement to give the bond or other written instrument, or which may not reasonably be explained as consistent with the truth of the answers. Special reference is also made to the details of the arrangement, as set forth in the bill of complaint ; but all those matters must be weighed in connection with the circumstances which existed at the time the arrangement was made. The title in the homestead had become absolute in the heirs of the mortgagee, and all hope of being permitted to remain longer in possession was gone. His sons could do nothing, and he was destitute of means to do anything himself. Unless something was done, the homestead farm must pass into the possession of strangers. One resort only remained, and that was to appeal to his son-in-law ; and he accordingly went to his house to make that appeal. But the son-in-law could not furnish the means unless his father would render him assistance. Difficulties arose and objections were made in regard to the confusion in the title papers. All had full confidence in the attorney who had charge of the ejectment suit, and application was made to him for advice and assistance in that behalf. Accordingly, he prepared the title papers, and they were all executed in his presence. Under these circumstances the evidence offered by the complainant is hardly sufficient to prove his case, even when unopposed by that offered by the respondents. Much testimony, however, has been offered by the respondents, and the complainant's testimony must be weighed in connection with all that is of a contradictory character. Great reliance is placed by the complainant upon the testimony of his grantor, to overcome the allegations of the answers ; but the testimony of that witness is subject to observations. More than twenty witnesses have been examined to impeach his character for truth and veracity ; and although a

greater number even have been called to support his character, still the affirmative statements of the first class do impair his credit. His own statement also, that he advised the complainant to purchase his interest and take the fight with the respondents, accompanied as it was with the remark, that he should be a witness if a suit was brought, adds something to the distrust created by the testimony of those witnesses. Nothing can be more explicit than is the denial, in the answers of the respondents, of every material allegation in the bill of complaint; and those denials are strongly confirmed by the statements and acts of the complainant and his grantor during the negotiations for the purchase of the farm, and before and after the conveyances were made. Strong confirmation of the truth of the answers is also derived from the statements of the complainant's grantor, made pending the negotiations, and during his visit to the family of his son-in-law. Those statements are fully proved, not only by three of the children of his son-in-law, but by two or three persons who were residing in the family. Subsequent acts and declarations of the same party are also introduced, which go very far to show that there was no such understanding as is alleged in the bill of complaint. The respondents also examined Thomas M. Stetson, the attorney, who had charge of the ejectment suit, and who prepared the conveyances between the parties. His testimony shows that he advised the defendant in that suit, that he had no defence; that he suggested to Horatio Leonard to buy the farm; that he was not willing to buy a part, unless he could have the whole; that he objected to making the purchase, on account of the confusion in the title papers and of the litigious spirit of the defendant in that suit; that the defendant urged the purchase upon his son-in-law, in order that the property might remain in the family; that the writing, consenting to judgment in that suit and the quitclaims, were executed at the same time, in his office, in the presence of the complainant and his grantor; that the quitclaims were given at the recommendation of the attorney, not to pass any valuable interest, but merely to make a clear and unquestionable title; and that nothing was said about any right of redemption in the complain-

ant or his grantor, or any reconveyance from the grantee. Suffice it to say, without entering more into the details of the evidence, that I am of the opinion that the complainant has failed to prove the agreement set forth in the bill of complaint.

But suppose it were otherwise, and it were fully proved that Horatio Leonard, before and at the time he purchased the farm of the heirs of William Rotch, made the agreement set forth in the bill of complaint; still it is insisted by the respondents that the complainant cannot prevail, because neither the agreement, which constitutes the foundation of the suit, nor any memorandum or note of it is in writing, signed by the party to be charged therewith. Gen. Stat. c. 105, § 1, p. 527; Gen. Stat. c. 100, § 19, p. 502; *Boyd v. Stone*, 11 Mass. 342. They insist that the statute extends to any agreement by which rights already acquired in real estate, under a deed, are enlarged or qualified; that not only is an agreement to execute a mortgage invalid, without writing, but also that an agreement to make a defeasance to an absolute conveyance, or to convert a written mortgage into a conditional sale, or to foreclose a mortgage, even when the agreement is made by solicitors, in anticipation of a decree of court to the same effect, are also invalid, unless the promise, contract, or agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized. Gen. Stat. 527; Browne on Stat. of F., § 267, p. 272. On the other hand, it is assumed by the complainant, that the decisions of the Supreme Court and of this circuit clearly take this case out of the operation of the statute, and so clearly so, that the case can no longer be regarded an open one. To support that proposition, they refer to the following cases, and insist that they are decisive of the point: *Eldridge v. Jenkins*, 3 Story, 181; *Wyman v. Babcock*, 19 How. 289; *Russell v. Southard*, 12 How. 139; *Morris v. Nixon*, 1 How. 126; *Taylor v. Luther*, 2 Sumn. 228. After a careful examination of those cases, I am of the opinion that they do not control the question involved in this case. Take, for example, the case of *Russell v. Southard*, and the only point decided is,

that when the question before a court of equity is whether a deed, which purports upon its face to be an absolute deed, was in reality a deed or mortgage, extraneous evidence is admissible to show that it is only a mortgage. Subsequently, when the question was again presented in *Babcock v. Wyman*, a majority of the court adhered to the same rule. No such question, however, is presented in this case, as fully appears from the explanations already given. Suppose the rule to be a sound one; still it has no application to this case. Where the complaining party parts with the title, and it passes from him to the respondent, that rule may be applied; but it has no application to a contract to convey land, or to an agreement to give a bond or written instrument to convey the same, in cases where the party to be charged derived his title from a stranger. Browne on Stat. of F., § 266, p. 272; *Ledford v. Ferrell*, 12 Ired. 285; *Clabaugh v. Byerly*, 7 Gill. 354; *Boyd v. Stone*, 11 Mass. 342; *Woods v. Wallace*, 22 Penn. 171; *Cox v. Peele*, 2 Bro. C. C. 267. Judge Story pressed the exception to the rule to the utmost verge in *Eldridge v. Jenkins*, 3 Story, 181; but he by no means went far enough to bring this case within the operation of the principle which he there adopted. Agency is not proved in this case, and it cannot be regarded as a case of resulting trust. Proof of fraud also is wanting; and there is no just pretence of part performance, unless it be assumed that the purchase of land by one party is a part performance of an agreement made by him to convey the land to another; which cannot be admitted. None of the elements, therefore, which Judge Story found it necessary to combine, to support the decree in *Eldridge* and *Jenkins*, are to be found in this case.

Some of the evidence introduced to prove the oral agreement set forth in the bill of complaint has some tendency also to show that the complainant or his grantor may have a right to redeem the parcels of land, if any, included in the quitclaim deeds which were not embraced in the mortgage to William Rotch. Should that suggestion be made, the answer to it is, that the bill of complaint is not one for redemption. Suit was brought upon the alleged oral agreement to give a bond or other written instru-

ment, to convey upon certain conditions, and not for the redemption of those lands. Evidence was taken by both parties, in respect to the allegations in the bill of complaint; and the tender and demand made by the complainant had respect to the same matter of controversy. In view of the whole case, I am of the opinion that the complainant, upon the proofs exhibited, has shown no ground for relief; and the bill of complaint is accordingly dismissed with costs.

RHODE ISLAND DISTRICT.

NOVEMBER TERM, 1861.

THE UNITED STATES, by Libel, v. THE BARK REINDEER, — DAVID M. COGGESHALL, HENRY P. BOOTH, and JAMES E. WARD, Claimants.

A vessel was seized under the act of March 22, 1794, as being fitted and prepared for the slave-trade. At the time of the service of the monition by the United States marshal she was in the possession of a State sheriff, by virtue of an attachment issued from a State court. *Held*, that this court still had jurisdiction, because forfeiture of a vessel arises from the wrongful act of the owner, or some person in charge of the vessel, and wherever the forfeiture is made absolute by an act of Congress, the forfeiture attaches at the time the wrongful act is committed, and consequently the owner is divested of his title *eo instanti*, and the same becomes vested in the United States.

The possession of a sheriff, under civil process, whether from State or Federal court, will not defeat the operation of the revenue laws of the United States, or impair a forfeiture for engaging in the slave-trade, or for fitting a vessel for the same.

Under the first section of the act of March 22, 1794, a vessel is liable to be prosecuted and condemned for engaging in the slave-trade, in any of the circuit or district courts where the vessel may be found and seized. Therefore where a vessel had been fitted and prepared for a traffic of this kind in New York, it was held that she was properly condemned by the District Court of Rhode Island, having been seized there.

THIS was a libel of information filed by the district attorney, in behalf of the United States, and claiming forfeiture of the vessel. It was founded on the first section of the act of March 22,

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1794, the first section of the act of May, 1800, and the second section of the act of April 20, 1818. The libel was filed in the court below, August 7, 1861, and the case came before this court on appeal from a decree condemning the vessel as forfeited to the United States. It was alleged that the bark Reindeer, of the burden of two hundred and forty-eight tons, was, on the 26th of January, 1861, by a citizen or citizens of the United States, either as master, factor, or owner, fitted, equipped, and prepared, within the port of New York, for the purpose of carrying on the trade or traffic in slaves to some foreign country, contrary to the first-named act of Congress. Other counts were contained in the libel which were drawn upon the other acts above named. According to the libel, the bark arrived at the port of New York on July 11, 1861, and it was alleged that she was seized by the collector of the port on the 1st of August following. Claim was filed by Gregorio Tejedor on August 19th, averring that he was the true and *bona fide* owner of the cargo, and the charterer of the vessel, and praying that he might be admitted to defend.

He subsequently filed an answer, denying every statement of the libel. Certain other parties also appeared and made claim to the vessel, and were admitted to defend. They were David M. Coggeshall, sheriff of the county of Newport, and Henry P. Booth and James E. Ward, claiming the vessel as attaching creditors. Answer was also filed by them, denying all the material allegations of the libel, and also pleading to the jurisdiction of the court.

In the ninth article of their answer they alleged that David M. Coggeshall, on July 1, 1861, and up to the time of the hearing, was sheriff of the county of Newport, and that on the 20th of that month, and again on the 26th, he seized and attached the bark, her cargo, apparel, and furniture, by virtue of several attachments duly issued out of the Supreme Court of the State; that he thereby became possessed of the bark, her cargo, &c., and that by reason thereof this court had no jurisdiction of the vessel or her cargo. They also alleged that the several acts in the libel charged to have been done were stated to have been so done in the port of New York, and not within the district of

Rhode Island, wherefore they averred that the court had no jurisdiction of the charges.

During the hearing, claim was also filed by the vice-consul of Spain, stating the bark, her cargo, &c., to be the property of Gregorio Tejedor, before named. Appeal from the decree of the District Court to this court was taken by the sheriff of the county of Newport and the attaching creditors. Tejedor was allowed an appeal, upon condition of his filing a bond to prosecute the appeal, but he never complied with the condition, and did not perfect his appeal.

The following was a cargo list of the vessel : —

Account of cargo and stores examined by me, as landed in Newport, from bark Reindeer of New York, by order of A. Sanford, United States marshal for Rhode Island, August 12, 1861.

1 cask, containing hand-saws, back-saws, and packages knives and forks, and bit-stock.

1 “ “ sauce-pans, cooking-pans, with their covers.

2 “ “ paints in pans. (Not on manifest.)

1 “ “ table cutlery, iron spoons, hatchets, hammers, &c.

2 “ “ sauce-pans, cooking-pans, and covers.

3 “ “ glass tumblers.

2 packages, containing thirty mess or camp kettles.

16 pipes, “ bread.

187 new oars.

1 cask, containing pickled haddock, fish. (Not on manifest.)

3 bags coarse salt. (Not on manifest.)

3 packages, 1 barrel tesago, or jerked beef.

Examined in the store, August 13.

1 case of thin overcoats.

2 cases Spanish cigars in boxes.

40 boxes candles.

64 boxes brandy, preserved fruit.

38 boxes claret wines.

15 boxes O T gin.

7 boxes B brandy.

- 7 boxes gin.
- 100 kegs cut nails, of different sizes.
- 2 barrels lime, 1 barrel cement. (Not on manifest.)
- 117 whole pipes of agua ardente rum.
- 65 half-pipes of agua ardente rum.
- 1 case containing medicines in small packages.
- 2 cases, containing medicinal herbs and lint in packages.
- 4 large jars chloride lime.
- 1 demijohn disinfecting fluid.
- 1 box small sponges.

(Not on manifest.)

All the ship's stores for the voyage in the custom-house.

Examined in the custom-house, August 14.

- 1 cask butts and hinges.
- 3 casks iron chains from $\frac{1}{4}$ to $\frac{3}{8}$ inches.
- 1 cask table cutlery, &c.
- 1 cask steel or rat-traps.
- 1 cask butts, hinges, padlocks, spoons, &c.
- 4 cases mechuts or war knives.
- 6 to 8 thousand pounds tesago, or jerked beef.
- 65 pipes full, partly full, and empty ones, which all appear to have been used as fresh-water pipes. (Not on manifest.)
- 9 casks with two shooks, iron-hooped, and are used as ship's fresh-water casks.

The ship has a regular medicine-chest on board.

5 rolls and some loose flag matting. (Not on manifest.)

Among the charts examined on board the ship, there is one of the West Indies, and a new chart of the west coast of Africa, from Sierra Leone to the Cape of Good Hope; with an old log-book of a voyage to Bathurst, in Africa, in 1856 and 1857.

Examined on board ship.

A. Payne and Gilbert Deane, for appellants.

The United States court in admiralty has no jurisdiction in this case.

The thing sought to be affected by the proceeding having been,

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at the time of the commencement of these proceedings, in the custody of an officer of the State court, that custody and jurisdiction is exclusive, and there can be no concurrent jurisdiction. *Taylor et al. v. Carryl*, 20 How. 593, and cases cited; *Parsons*, Mer. Law, 523.

The Supreme Court of the United States has often decided the converse of this proposition in cases where the court acquired the first jurisdiction over the person or property, namely, that no State court can impede or oust the jurisdiction thus obtained, and that the same rule obtains where the jurisdiction of a State court has first attached.

The fact that the marshal took manual possession does not affect the question, the State court never having renounced its jurisdiction and control.

The United States government having granted to this vessel a clearance from the port of New York, and she having sailed under it and delivered her cargo in Havana, they are estopped from setting up or saying that the vessel was at that time fitted out as a slaver in the port of New York. 1 Greenl. Ev. § 207; *Kennedy v. Strong*, 14 Johns. 131.

But if they were not estopped, the evidence is clear and uncontradicted that at that time she was fitted out for and sailed on a legitimate voyage.

No forfeiture of vessel or cargo will be presumed; like other penal laws these will be strictly construed. *Clark v. Strickland et al.*, 2 Cur. 439; *United States v. Ship Emily & Caroline*, 9 Wheat. 381.

The fitting out of this vessel, her apparel, tackle, or furniture, are neither of them within the language or the intention of the statute of 1794, and that statute does not confiscate the cargo.

This case does not come within the prohibition of the statute of 1818, because the Reindeer did not sail from any port within the United States at the time she had on board this cargo which is claimed to be suspicious, and which furnishes the only evidence against her.

It is under this section of the statute only that the cargo is affected by the intended or actual employment of the vessel.

4 .

There is no evidence that a single article of cargo on the Reindeer, when she was seized, was put on her in New York. But the claimants have proved that every article of cargo was laden on her in Havana.

The only remaining question is that arising upon the statute of 1800, which declares: "It shall be unlawful for any citizen of the United States, or for any person residing within the United States, to hold or have any right or property in any vessel employed or made use of in the transportation or carrying of slaves from one foreign country or place to another."

The Reindeer has not been "employed in transporting slaves from one foreign country to another."

The decisions of the court in *The Brig Alexander*, 8 Mas. 175, *United States v. Schooner Catharine*, 2 Paine, 721, fully sustain the position of the counsel for the claimants. The Supreme Court in *United States v. Morris*, 14 Pet. 473, define the term "employed," as used in the statute, as, "not only the act of doing it, but also to be engaged to do it, to be under contract or orders to do it."

Applying this authoritative and common-sense exposition of the statute to this case, is there any pretence that the Reindeer was "employed" in the transportation of slaves?

This vessel was not so "employed," "engaged to do it," "under contract to do it," unless the charter-party of Captain C. was valid; if he ran off with or stole the vessel, or violated his duty as captain, in signing that paper, then the vessel was not so "employed" while on her voyage to Africa or any other place, because there was no valid contract of employment.

There is no evidence whatever that the owner of this vessel (Pearce) had any knowledge of "the employment" which it is claimed is to work a forfeiture; and the reasoning of the court in the case of *The Catharine*, 2 Paine, as well as common justice, show that the property of no citizen can be forfeited without a voluntary crime on his part.

The testimony of these pretended or professed experts should be entirely disregarded by the court. None of them have any knowledge on the subject on which they have testified. All of

them speak from hearsay, and not from knowledge. Each of them contradicts the other, and they only say this cargo is one which might be proper for a legitimate or an illicit voyage. In such case the vessel is to be discharged. *United States v. Catherine*, 2 Paine, 729.

In no event can the cargo which is the property of a Spanish citizen be condemned. No law of Congress authorizes it. International law forbids it.

Wingate Hayes, United States district attorney.

The sheriff of Newport, and the said Henry P. Booth, and James E. Ward & Co. claim the vessel and cargo upon the ground that they had, before the marshal served the monition, attached the vessel and cargo as the property of Pierre L. Pearce.

The claimants deny the jurisdiction of this court in this case, upon two grounds.

1. Because the vessel and cargo being, as they say, at the time of the service of the monition in the custody of an officer of a State court, that custody and jurisdiction is exclusive, and there can be no concurrent jurisdiction.

2. Because the offence having been committed, if at all, in the district of New York, the vessel was amenable to that jurisdiction only.

Considering the questions of jurisdiction in their order, the libellants say:—

This court has jurisdiction, notwithstanding the alleged attachment. The forfeiture of the vessel attaches at the time of the commission of the act inducing forfeiture, thereby *eo instanti* divesting the owner of all title, and vesting the same in the government. Hence the sheriff could not attach Pearce's interest, for he had none to attach. The alleged attachment was a nullity.

That a forfeiture made absolute by statute dates back by relation to the time of the commission of the offence, and not to the date of the judgment, see *United States v. Grundy*, 3 Cran. 338; *United States v. Bags of Coffee*, 8 Cran. 398; *United States v. Mars* (affirms last case), 8 Cran. 417; *Gelston v. Hoyt*, 3 Wheat. 246; *Certain Logs of Mahogany*, 2 Sumn. 589; *The Flo-*

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renzo, 1 Bl. & How. 52; *Caldwell v. United States*, 8 How. 366; *Fontaine v. Phoenix Ins. Co.*, 11 Johns. 293; *Roberts v. Wetherhead*, 12 Mod. Rep. 92; *Wilkins v. Dispard*, 5 T. 112; Conk. Tr. 331, ed. 1842.

Possession by the sheriff under a civil process from a State court will not prevent the operation of the laws of the United States in cases of forfeiture, or oust the admiralty jurisdiction of the United States courts. *The Florenzo*, 1 Bl. & How. 52; *Taylor v. Carryl*, 20 How. 609; *Certain Logs of Mahogany*, 2 Sumn. 584.

In the last-named case, Judge Story said: "No doubt can exist that a ship may be seized under admiralty process, for a forfeiture, notwithstanding a prior replevin or attachment of the ship then pending."

If the doctrine contended for by the claimants be law, then the penal laws of the United States relating to revenue navigation, the slave-trade, &c., will, by means of collusive attachments, be rendered null and void.

Not a case has been or can be found sustaining the proposition of the claimants in cases of forfeiture.

The case of *Taylor v. Carryl*, and all the cases therein cited, refer solely to maritime liens, such as seamen's wages, claims for collision, &c., where the State and Federal courts generally have concurrent jurisdiction.

The leading case of *Taylor v. Carryl*, 20 How., does not refer nor is intended to apply to cases of forfeiture. Judge Taney's opinion in that case, p. 609.

The sheriff in fact exercised no control of the vessel after the service of the monition. The marshal removed cargo, and, as he swears, had exclusive jurisdiction. The libel is properly filed in this district.

The District Court of the district where the seizure is made has exclusive jurisdiction. *Brig Little Ann*, 1 Paine, 40; *United States v. The Betsy*, 4 Cran. 452; *Keene v. United States*, 5 Cran. 310; *The Bolina*, 1 Gall. 75; *The Abby*, 1 Mas. 360.

"The vessel is liable to be seized, prosecuted, and condemned, in any of the Circuit Courts, or District Court for the district

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where the said ship or vessel may be found or seized." Act of March 22, 1794, § 1, being one of the acts under which the libel is filed.

Judge Betts, in the case of *The Kate*, says: "The doctrine is clearly settled, that in prosecutions for penalties or forfeitures, evidence less than what would amount to probable cause, and which would only be a reasonable ground of suspicion against the party proceeded against, is competent and proper proof upon which such forfeiture may be adjudged, if not satisfactorily contradicted, or explained by countervailing proofs"; and cites *Murray v. Charming Betsey*, 2 Cran. 122; *Maley v. Shattuck*, 3 Cran. 488; *Josefa Segunda*, 5 Wheat. 338. See also *Schooner Catherine*, 2 Paine, 721; *Josefa Segunda*, 10 Wheat. 312; *Brig Struggle*, 9 Cran. 71.

The Reindeer was found with a fit-out, preparation, and cargo, that indicated beyond all question that she was destined on a voyage for slaves.

Though it is not necessary that the vessel should be completely fitted out, any preparation for the slave-trade being sufficient (*Emily and Caroline*, 9 Wheat. 381; *The Plattsburgh*, 10 Wheat. 133); yet in the case of the Reindeer, scarcely anything was wanting to indicate her complete fitment as a slaver. See case of *Plattsburgh*, 10 Wheat. 133.

That the Reindeer was not on a legitimate voyage, but was bound for the coast of Africa for slaves, is evident from the ship's papers, especially the sea letter and manifest, and from the protest of the captain.

The manifest declares the vessel to be bound for Falmouth for orders. The captain in his protest swears she was bound for Falmouth.

The Spanish sea letter, enclosed in a sealed package, declares the destination to be San Antonio.

Honest traders do not have conflicting papers.

The cargo is neither adapted to the Falmouth nor San Antonio markets.

At the present hearing, this fact is admitted; though the record

shows that witnesses were cross-examined at length to prove that the cargo was suitable for either market.

No evidence, however, has been offered by claimants to show the true destination of the vessel.

The character and destination of the Reindeer is shown by her cargo.

The character of the cargo always affords strong evidence. A cargo of cotton is presumed for some place of cotton manufactures; of molasses, not for Cuba, or of coals for Newcastle.

The cargo occupies not over one third of the vessel, consisting chiefly of articles usually found on board slave vessels, and of some articles never found on board other vessels, but indispensable in slavers; nearly all the suspicious articles are disguised on the manifest, or not manifested at all. Not a tittle of explanatory evidence is offered, although the claimants could show the true destination of the cargo without difficulty.

A bark of two hundred and forty-eight tons, bound to the coast of Africa, with a captain, crew, and two supercargoes, irons, chains, padlocks, sweeps, lime, biscuit, jerked beef, mess-kettles, sauce-pans, flag mattings, sponges, medicines (adapted in quantity and kind for a slave voyage), chloride of lime, and disinfecting fluid,—all to obtain sixty-five wine pipes of palm oil!

The vessel was fitted, equipped, otherwise prepared, and caused to sail, by Pearce, or Cunningham, her master, either as owner or master, for themselves or for some other person.

The vessel was fitted, equipped, otherwise prepared, and caused to sail from New York, for the purpose of carrying on traffic in slaves.

Unless clear and satisfactory explanation be furnished by the claimants to the contrary, it will be presumed that the vessel was fitted, equipped, prepared, and caused to sail, and intended for the purpose of carrying on the business in which she was found to be engaged. See rule of evidence in slave cases. Judge Betts's opinion in *The Kate*.

The burden lies on the claimants to show this by clear and unequivocal testimony. *The Catherine*, 2 Paine, 747; *Josefa Segunda*, 5 Wheat. 338.

The claimants have not even attempted to explain anything in relation to the cargo, its destination, the objects of the voyage, or the presence of Garcia and Pinto on board.

They set up two antagonistic excuses : —

1st. That the vessel was chartered to Tejedor.

2d. That she was sold by Pearce to Tejedor, and that Pearce knew nothing of her use ; that in fact the bark was on a new voyage.

The Reindeer, having been admitted to be owned by an American citizen, and proved to have been found employed in the slave-trade, must be condemned under the act of Congress of May 10, 1800, § 1.

A vessel bound for Africa, for slaves, is "employed" in the slave-trade, within the meaning of the act. *The Catherine*, 2 Painé, 721 ; *Brig Alexander*, 3 Mas. 175.

A captain has a right to charter a vessel in a foreign port. Abbott on Ship. *passim*.

If a vessel be so "employed," she will be forfeited, though the owners be innocent. *United States v. Brig Malek Adhel*, 2 How. 210.

The act of 1800 was made to meet cases like this, where there were pretended transfers and other evasions.

Where the proceeding is *in rem*, the vessel may be held guilty, whoever be the owner.

Courts will not strain the law or facts to find loopholes for vessels, virtually admitted or proved to be slavers, to escape through.

It is as much a violation of the law to fit out, prepare, and cause a vessel to sail for the purpose of selling or chartering her to be used as a slaver, as to use her one's self for that purpose ; especially, where the risk of retention of the legal title, so as to get the protection of our flag, is run and paid for.

CLIFFORD, J. Two questions of jurisdiction are presented by the pleadings, which will first be considered.

It is insisted by the claimants that this court has not jurisdiction, because the vessel and cargo, at the time of the service of the monition by the marshal, were in the custody of the sheriff of the county of Newport, under a process of attachment

issued from the State court. But the proposition cannot be sustained, for several reasons, which will be briefly stated. Forfeiture of a vessel arises from the wrongful act or acts of the owner, or some person or persons in charge of the vessel; and whenever the forfeiture is made absolute by an act of Congress, the forfeiture attaches at the time the wrongful act is committed, and consequently the owner is divested of all title *eo instanti*, and the same becomes vested in the United States. Where the United States have an election to proceed against the vessel, as forfeited, or against the person who committed the wrongful act, no such consequences follow, until the election is made. Accordingly, it was held in *Certain Bags of Coffee*, 8 Cran. 398, that the forfeiture of goods for a violation of the non-intercourse act takes place upon the commission of the offence, and avoids the subsequent sale to an innocent purchaser. But where an election was given to proceed against the vessel, or against the person who took a false oath to procure a registry of the vessel, the court held that the forfeiture did not take place until that election was made. *United States v. Grundy et al.*, 3 Cran. 338; *Brigantine Mars*, 8 Cran. 417; *Gelston v. Hoyt*, 3 Wheat. 246; *Certain Logs of Mahogany*, 2 Sumn. 589; *The Florenzo*, 1 Bl. & How. 61; *Caldwell v. The United States*, 8 How. 366; *Fontaine v. Phoenix Ins. Co.* 11 Johns. 293. Evidently the case under consideration falls under the first branch of the rule; but the objection to the jurisdiction may be overruled upon another ground. Possession by the sheriff under a civil process, whether from a State or Federal court, will not, in my opinion, defeat the operation of the revenue laws of the United States, or the laws imposing forfeiture for engaging in the slave-trade, or fitting, equipping, or preparing vessels for that purpose. The respondents rely upon the case of *Taylor v. Carryl*, 20 How. 609; but in the opinion of this court, the opinion in that case was never intended to be extended to cases of this description.

In the second place, it is insisted by the claimants that the alleged forfeiture is cognizable in the District Court of the United States for the district of New York, and not in the District

Court for this district. Provision is made by the first section of the act of the 22d of March, 1794, that the vessel shall be liable to be seized, prosecuted, and condemned, in any of the Circuit Courts or District Courts where the said ship or vessel may be found and seized. "Where found and seized," are the words of the act; and while it is not admitted that the Circuit Courts have any original jurisdiction in such cases, not a doubt is entertained that the libel was properly filed in the court below, and that the case is now properly here on appeal. 1 Stat. at Large, 349; *Brig Little Ann*, 1 Paine, 40; *The Betsey*, 4 Cran. 452; *Keene v. United States*, 5 Cran. 310; *The Bolina*, 1 Gall. 75; *The Abby*, 1 Mas. 360.

Having disposed of the questions of jurisdiction, it becomes necessary to consider very briefly the merits of the controversy. Numerous positions are assumed by the respondents to show that the evidence is not sufficient to justify a decree of condemnation; but in the opinion of this court, it is full and complete, and substantially without conflict or contradiction. Her fitment, preparation, and cargo furnish very decisive evidence that her destination was such as is charged in the libel. That she was not on a legitimate voyage is strongly indicated by her papers. While her manifest declares the vessel to be bound to Falmouth for orders, the protest of the master states that she was bound for Falmouth, and the sea letter, which was enclosed in a sealed package, declares her destination to be for San Antonio; and the evidence shows that her cargo was adapted to neither place. No satisfactory evidence is offered to show where she was bound, but the clear inference from the facts and circumstances is that she was bound on a voyage for slaves. Nothing else can be inferred from her cargo, and such is the opinion of all the experts in the case. A specification of the articles composing the cargo is unnecessary, as they comprise nearly everything which is usually to be found in vessels fitted out for the slave-trade. Certain articles were not included in the manifest, and all or nearly all such were of the class to be found in vessels engaged in that trade. Suspicion also arose in the same direction, from the presence of certain passengers on board, and their conduct, and especially from the conduct of the master and owner.

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All explanation is declined, and the claimants rely mainly upon insufficiency of the evidence adduced for the government. Under the circumstances, it is not thought necessary to present the details of the evidence, which would be merely to repeat what is very well stated in the brief of the libellant. Suffice it to say, that, after full consideration, I am of the opinion that the District Court could not have decided otherwise upon the evidence. Extended argument upon questions of fact is of no service to either party, and except in cases of real doubt, it will not be attempted. Regarding the case as a clear one, I shall, without hesitation, affirm the decree of the District Court with costs.

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Where fraud is imputed in the bill, and the answer is responsive and the denial positive, the universal rule is that a decree cannot be pronounced on the testimony of a single witness, unaccompanied by corroborating circumstances.

Inasmuch as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances, in addition to his single witness, to turn the balance.

Satisfactory proof may be made by circumstances alone, or partly by circumstances and partly by direct testimony, or entirely by the latter.

Whatever be the nature of the evidence, the measure of proof required is the same; that is, it must be equal to two witnesses, or one witness with corroborating circumstances sufficient to turn the balance.

In case of an assignment by a debtor, with preference of certain creditors, *held*, that where the proceeding was under the law of a State, such law must furnish the rule of decision for the Circuit Court sitting in the State.

Assignments with preferences to certain creditors being held valid by the courts of Rhode Island, the Circuit Court sitting in that State will follow that rule as to all such assignments under the State law.

BILL IN EQUITY. The case set out in the bill was in substance as follows:—

Edward Seagrave, of Providence, was the owner of large real and personal estates, but, becoming indebted for large sums of money, failed. Three of the complainants, Parker, Chapman, and Tobey, for a valuable consideration, became possessed of certain over-due and unpaid bills of exchange, and promissory notes, drawn and made by Edward Seagrave, commenced suit

against him upon them, and recovered a judgment thereon for \$60,520.38, for which execution issued and was partly satisfied. Soon after, Parker, Chapman, and Tobey themselves failed and assigned their property, including the judgment, to George Stevenson, the other complainant in this case. During the pendency of the first suit above mentioned, as alleged in the bill of complaint, the said Edward Seagrave combined and confederated with Phetteplace and George A. Seagrave, two of the respondents in this case, to defraud the complainants in the present case, and to that end came to an agreement that the two named respondents should purchase paper outstanding against Edward Seagrave, to the amount of \$40,000 or \$50,000, at a price not exceeding twenty per cent, and the debtor should convey to the purchasers of the paper all or nearly all his visible attachable property, allowing them the full value of the paper on its face, and thus leaving in their hands the difference between the face of the paper and what they paid for it. The respondents purchased the paper to the amount of \$50,000 at rates varying from fifteen to twenty-five per cent of its value, and the debtor conveyed to them certain stocks and real estate, executed to them a mortgage of certain other real estate, and delivered to them certain notes and other evidences of debt, in all amounting to \$50,000, and received from the purchasers of the paper \$43,000 of the sum transferred to them, under the agreement. This was charged as a fraud upon complainants, and as intended to hinder and delay them in the collection of their judgment. Edward Seagrave then assigned all his property to one Walter W. Updike, one of the respondents, preferring J. S. Phetteplace and George A. Seagrave for the payment of all notes, drafts, and acceptances held and owned by them, and on which the assignor was liable, and also for all debts due to them from him, and to indemnify them for all liabilities which they had incurred on his account. Prior to the assignment, the assignee had been the attorney of the assignor, and knew the circumstances of the bargain and agreement. The deed of assignment was alleged to be a part of the fraudulent scheme, and intended to cover up the previous fraudulent transaction, which was well known to the assignee at the time the

assignment was executed. To sustain the imputation of fraud it was alleged that the paper purchased by the two respondents, and which was by them delivered to the drawer and maker, was by him delivered to his assignee as part of the assigned property, and was treated by the parties as the property of the assignor. The bill prayed for a discovery, that respondents might be decreed to pay the former judgment of the complainants, out of the property so held by them; for an injunction, for a receiver, and that the mortgage deed and assignment might be cancelled and discharged. Answers were filed by the purchasers of the bills and notes, and by the assignee of the drawer and maker, admitting all the allegations of the bill, except the following: It was denied, that the complainants paid any value for the notes and bills of exchange, &c., of Edward Seagrave, which they held, but the real interest in them was averred to be in other parties, the complainants receiving the paper solely for the purpose of commencing suit in the Circuit Court; it was denied that any combination was made to defraud the complainants; that any understanding was had with Edward Seagrave for them to make a purchase of the paper, that he should turn over to the respondents any part of his property in any manner to hinder and delay the complainants in the collection of their judgment, but they alleged that they purchased the paper with their own property, as the genuine evidence of a real *bona fide* indebtedness of the drawer and maker. It was also denied that respondents held any part of the property of Edward Seagrave, upon any secret trust, or in any manner for his benefit and use, or that the assignment was a part of any fraudulent scheme or a cover for such scheme; that any part of the assigned property was subsequently treated as the property of the assignor, but they averred that the property conveyed to them for the purchase of the paper was ever afterwards used and treated by them as their own; and that no material part of the same was ever withdrawn and used by the grantor with the knowledge and consent of the respondents.

T. A. Jenckes, for complainants.

The defendants, Phetteplace and G. A. Seagrave, were, at most,

volunteers in the purchase of claims against Edward Seagrave; they had full notice that he was hopelessly insolvent. Phetteplace had received a conveyance of a part of his personal property, without consideration, and of another part of his personal property, for a note on demand, which property was worth about as much as was paid for the depreciated paper; and George A. Seagrave was Edward's brother, and both had the means of knowledge, and actually knew the amount of property held by Edward, and that a conveyance to them by Edward, of the property described in the present suit, would deprive Edward of all means of paying his other creditors; and their knowledge throws upon them the burden of proving the fairness of the transaction. This they have not done; but have admitted that they purchased depreciated paper, which Edward Seagrave claimed that he was under no moral obligation to pay, and then claimed payment in full, knowing that such payment would deprive the debtor of all means of paying anything to his other creditors. They were not his just creditors, nor was the debt in their hands an honest debt; but the whole scheme was a gross fraud on the complainants. *Kaine v. Weigley*, 22 Penn. 179; *Garland v. Rives*, 4 Rand. 282; *Nesbitt v. Digby*, 13 Ill. 387.

The assignment to Updiko is void, as it was part of the scheme to cover up the fraud by which the property of Edward Seagrave was placed in the hands of Phetteplace and G. A. Seagrave. Such assignments are no obstruction to the execution of legal process, or to the granting of relief in equity. *Stewart v. Spenser*, 1 Cur. 157; *Heydock v. Stanhope*, 1 Cur. 471; *In the Matter of Durfee*, 4 R. I. 401; *Fuller et al. v. Ives et al.*, 6 M'Lean, 478; *Am. Lead. Cas. Vol. I.*, 17-75.

The transfer of property to Phetteplace and G. A. Seagrave by Edward Seagrave was a voluntary conveyance, and the execution of the assignment subsequently, covering the same property, and recognizing the existence of the debt due to Phetteplace and Seagrave, pretendedly settled by this transfer, is evidence of the fraudulent character of the transfer. *Cathcart et al. v. Robinson*, 5 Pet. 263.

Aud on the principle that if a contract be fraudulent and void

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in part, it is void altogether, the complainants are entitled to a decree declaring the mortgage from Edward Seagrave to Phetteplace and Seagrave void, and affirming the title of the complainant Stevenson, under the execution sale, and also for the payment of \$43,856.61, with interest.

W. H. Potter, for defendants.

The gist and essence of complainants' bill is, not that the several things were done, but that they were done in pursuance of a compact and understanding to do them, for the purpose of covering up this property for the benefit of Edward Seagrave, and thereby to defraud his creditors.

In Rhode Island the right to make preferences in an assignment has ever been settled law, and the right to do so is just as perfect a right as is the right to make an assignment. The right is not partial, but absolute. If the debt be genuine, be the preference to parent or child, husband or wife, or relative, or be it to a confidential indorser, as it is termed, the preference is unquestionable, and the assignment valid.

But the complainants charge that the real scheme was to convey this property ostensibly to pay their debts, but really to keep it from complainants and from the creditors of Edward Seagrave, and to keep it for his benefit.

The complainants have no right to maintain this bill, because said complainants did not, at the commencement of this suit, and do not now, own the claims on which their bill is based; that they were nominally assigned to them for the purpose of having a suit brought thereon in this court; and that in fact said claims, whatever they are, belong to Hill, Carpenter, & Co., or their assignees, all of whom are citizens of this State.

Reference on this point is made to the complainants' bill, in which they do not allege that they are the owners of this paper, but say that they became possessed of the same.

It is quite as necessary to give jurisdiction, that the transfer of paper on which a claim is sued should be *bona fide*, as that change of citizenship, in order to give jurisdiction, should be *bona fide*. *Jones et al. v. League*, 18 How. 76 - 81.

The court have no jurisdiction of the suit.

Supposing, for the sake of the argument, that the intention of the parties to the pretended assignment was not to make a mere nominal transfer for the purpose of commencing a suit in the name of the complainants, still Hill, Carpenter, & Co., or their assignees, have the legal title to the paper in question, and are the owners of it. They do not pretend, the paper does not, to have transferred to complainants the debt evidenced by that paper. Had the paper been indorsed over by Hill, Carpenter, & Co. without more, there might have been a presumption that they had absolutely sold and conveyed it. But the assignment expressly declares that it is not sold; that it is not absolutely conveyed; that the property is not parted with. It is merely pledged as collateral security for a debt owing from Hill, Carpenter, & Co. to complainants. The assignment does not even contain a power to complainants to collect the amount due from the parties to the paper. Hill, Carpenter, & Co. not only could maintain an action thereon in their own name, but at law an action thereon must be brought in the name of Hill, Carpenter, & Co. Hill, Carpenter, & Co. could at any moment they pleased pay the debt for which this paper was pledged to complainants, and demand, and be entitled at once to have the paper itself delivered to them. They, by so doing, could put an end, at any instant, to any suit that may be supposed to be brought on this paper by the complainants. If it is asked, How are the complainants to make said paper available as collateral security, if they cannot sue on it? I answer, by suing in the name of Hill, Carpenter, & Co., and if they interfered to prevent it, not having paid to complainants their debt, a court of equity would enjoin Hill, Carpenter, & Co. from interfering with the use of their names in such suit.

Notwithstanding this pretended conveyance, Hill, Carpenter, & Co. could make a valid transfer of the same paper to another party, subject only to the rights of the complainants and the person taking this transfer; the purchaser of the paper could tender to complainants the amount due them from Hill, Carpenter, & Co., and if complainants did not instantly deliver up possession of said paper to such purchaser, he could maintain an

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action of trover against them therefor. 1 Parsons on Cón. 600, 601, and notes; *Franklin v. Neate*, 13 M. & W. 481.

And the pledgee does not acquire an absolute title even by failure of pledgor to pay the debt. There is no forfeiture until pledgee's rights have been determined by what is equivalent to a foreclosure. *Brownell v. Hawkins*, 4 Barb. 491.

This is not so much as an assignment of a chose in action, in the ordinary meaning of the term, because it does not carry the property, and does not give a right of action at law in the name of the party receiving the chose in action.

Complainants have seen fit to appeal to the consciences of the defendants, in answer to these charges. The charges are not merely of actual fraud, but of a conspiracy to defraud carried into effect.

We claim for each and all these defendants the benefits of the rule of law, fixing the weight of an answer in chancery. It is equal to two witnesses, or one witness and circumstances equal to another witness. It is like the rule in a charge of perjury; and Greenleaf, Vol. III., latter part of § 284, well observes: "And the plaintiff having thought fit to make the defendant a witness, is bound by what he discloses, unless it is satisfactorily disproved. Nor is the answer in such cause to be discredited, nor any presumption indulged against it, on account of it being the answer of an interested party."

Each and all these defendants, under the solemnity of their oaths, positively and unequivocally deny every charge of fraud, or intention to defraud, contained in the bill, and any circumstance indicating fraud, or from which the court is asked to infer fraud.

CHURMAN, J. Undoubtedly the evidence shows that a large amount of negotiable paper was outstanding against Edward Seagrave, at the period mentioned in the bill of complaint, and that he was indebted in a considerable amount to the complainants for which they also held his negotiable paper. Assuming those facts as proved, the complainants insist that the evidence shows that the被告 made a fraudulent arrangement with the principal respondents in pursuance of which they purchased a

large amount of his paper so outstanding, at a discount of seventy-five or eighty per cent, and received from him a conveyance of his property, in exchange for the paper, and also a mortgage of certain real estate, as a further security for the same, estimating the paper, so purchased, at its full nominal value in the exchange. According to their theory, the intent and design of the debtor were to hinder, delay, and defeat his creditors, and that the respondents well knew that such was the intent and design of the debtor, and that they received the conveyance and mortgage with that knowledge, and have retained in their hands the amount of the difference between the value of the paper and the price paid for its purchase, for the use and benefit of the debtor. They do not controvert the fact that the debtor was justly and legally liable on the paper, but they contend, that the amount of the difference between the price paid for the paper and the nominal value is fraudulently held by the respondents, and that the mortgage to them, and the assignment to the other respondent, are without consideration and fraudulent, because, as they insist, they were executed, the one to secure that amount, and the other to facilitate the accomplishment of that purpose. Fraud, therefore, is the essence of the charge, and it is upon that ground that the complainants ask the interposition of the court, to cancel and discharge the mortgage, and the assignment of the real estate. Briefly stated, the transactions out of which the controversy has arisen were in substance and effect as follows, as appears from the pleadings and evidence: Large purchases of wool were made by Edward Seagrave, in connection with other parties, in 1853, for the purpose of speculation. Money was raised for that purpose, to a large amount, on bills of exchange and promissory notes drawn and made by the first-named party. They were unsuccessful in the speculation, and about the 4th of February, 1854, the drawer and maker of the bills and notes stopped payment on this class of paper. Payment of the paper being refused, it was protested, and a considerable amount of it subsequently went into the possession of the principal complainants. Suit was commenced by them on the paper, and a judgment recovered for the amount with costs of suit. An execution

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duly issued, and was levied on the real estate in controversy. Founded upon these preliminary facts, the complainants insist that their title to the real estate ought to be complete. But the respondents have a prior title, and unless the same is shown to have been fraudulently and wrongfully obtained, they must prevail in the suit. The complainants charge fraud, and in order to ascertain whether they have proved their charge, it becomes necessary to look with some care at the circumstances under which the respondents acquired their title.

Finding the aforesaid paper in the market, the respondents purchased a large amount of it at a discount of seventy-five or eighty per cent. All of the purchases were made openly, and on the 17th of November, 1854, the debtor executed to the purchasers the mortgage to secure the payment, allowing the full amount of the bills and notes. He had stopped payment on this paper on the 4th of February, 1854: and eleven months afterwards, on the 4th of January, 1855, he assigned his property for the benefit of his creditors, giving preference to the two first-named respondents. It was under these circumstances that the two principal respondents became possessed of the real estate on which complainants levied their execution: and the complainants charge that the conveyance was fraudulent, because designed to hinder, delay, and defeat creditors, and that the respondents now hold the estate upon a secret trust, for the use and benefit of the debtor, and that the assignee was cognizant of the fraud, and participated in its perpetration. No direct evidence to prove the alleged fraud is introduced by the complainants, and it should be borne in mind that they have not made the debtor a party to the bill of complaint. Direct proof of the alleged fraud being unobtainable, the complainants set forth the circumstances on which they rely to establish the charge. Taking the case as stated in the bill of complaint, the circumstances alleged by the complainants to prove the conveyance fraudulent may be classified into four distinct charges. First, they charge that the two principal respondents conspired and confederated with Edward Sangrave to defraud his creditors, and so that one entered into a secret bargain, understanding, and agreement that the former

should purchase some \$40,000 or \$50,000 of his outstanding paper, at a large discount, and that he, the debtor, should pay and secure the paper so purchased, at its full value, and that the purchasers should hold the property transferred to them for that purpose, over and above the amount paid for the paper, for the use and benefit of the grantor; and the charge is, that the corrupt and fraudulent agreement was substantially carried into effect. By the well-settled rules of law, the burden of proof is upon the complainants to make out their charge. Fraud may be inferred from circumstances, but it cannot be presumed without proof, and he who makes the charge has the burden of establishing it. It is insisted by the complainants, that, under the circumstances of this case, the burden of proving the fairness of the transaction is upon the respondents; but the proposition is wholly untenable, and cannot receive the least countenance. Appeal is made by the bill of complaint to the consciences of the respondents on this point, and they most explicitly and unequivocally deny the charge in all its details. Where fraud is imputed, and the answer is responsive, and the denial positive, the universal rule is, that a decree cannot be pronounced on the testimony of a single witness unaccompanied by corroborating circumstances. *Hughes v. Blake*, 6 Wheat. 468. Marshall, Ch. J., in *Clarke's Ex'rs v. Van Rensdyk*, 9 Cran. 160, states the rule as follows: that "either two witnesses, or one witness with probable circumstances, will be required to outweigh an answer asserting a fact responsively to a bill"; and he gives as a reason for the rule, that the plaintiff calls upon the defendant to answer an allegation, and thereby admits the answer to be evidence; and if it is testimony, says the chief justice, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness to turn the balance. But it must not be understood from what has been said, that direct evidence is necessary, in a case like the present, to support a bill of complaint, because such is not the rule of law. Satisfactory proof may be made by circumstances alone, or partly by circumstances and partly by direct testimony, or entirely by the latter. What-

ever may be the nature of the evidence, however, the measure of proof required is the same, that is, it must be equal to two witnesses, or one witness with corroborating circumstances sufficient "to turn the balance." Recurring to the pleadings, it is clear that the answer of the respondents falls within this rule, and must be overcome by circumstances more than equal to the positive testimony of a single witness.

Evidence is introduced by the complainants, to show that Edward Seagrave advised some of the holders of his paper to sell the same to the respondents, on the terms mentioned in the bill of complaint. Testimony to that effect was given by Elijah B. Newell, who says, among other things, that the debtor sent for him and advised him to sell to those parties, telling him that the terms were the best he would probably ever obtain. Spencer Mowry also testifies, that the same person first gave him information that those parties would purchase the paper, and that he urged the witness to sell to them, and that he did so, and they expressed the desire to purchase more of the paper. This witness also states, that he derived the impression, that the debtor had money left with his friends to buy the paper at twenty-five per cent, and intimates, that he accepted the same because he did not see any way to prevent the transaction. Five pieces of the paper were also sold to them by George Cooke on the same terms, but he does not testify to any conversations which can have any material bearing on the case. Many other facts and circumstances are introduced by the complainants, as having some tendency to authorize the inference, that the paper was purchased in pursuance of the alleged corrupt bargain, understanding, and agreement. They rely on the fact that the respondents purchased about the amount of paper specified in the bill of complaint; that the debtor subsequently conveyed the property and executed the mortgage as alleged; and that he paid and secured the full value of the paper. Considerations, however, of very great importance, connected with this inquiry, are entirely overlooked by the complainants. Apparently they seem to forget that the paper purchased was the *bona fide* paper of the debtor, and that the purchase of it, in open market, without any combi-

nation or confederacy to defraud, and without any corrupt bargain, understanding, and agreement with the debtor to do any acts to hinder, delay, or defeat his creditors, whether purchased at a discount or not, was a lawful transaction, and consequently that proof of those facts, without more, furnished no ground whatever, of relief, in this case. They also seem to be equally unmindful of the fact that the allegations of combination, confederacy, and fraud were unequivocally denied in the answer. Those denials are very properly invoked by the respondents as evidence to refute the allegations which constitute the foundation of the prayer for relief. Reliance is not placed upon those denials alone by the respondents, but they also rely upon the testimony of the debtor himself, who most unequivocally negatives the whole foundation of the allegations in the bill of complaint. Under these circumstances, it is impossible to say that the transaction was fraudulent, or that the complainants are entitled to relief. Second, adopting the classification already suggested, the next charge is that the assignment was executed as a part of the alleged fraudulent scheme, and as a cover to the arrangement previously carried into effect, in pursuance of the corrupt bargain, understanding, and agreement made between the assignor and the principal respondents. Like the first charge, this one also is met by the unqualified denial of the answer. All three of the respondents deny the charge in all its details, and the testimony of the debtor is equally explicit to the same effect. Attention was also called at the argument to the fact that the two principal respondents were preferred in the instrument, and it must be admitted that such a clause, in some jurisdictions, would render the assignment void, but the effect of it as a general rule must depend upon the local law. State laws may authorize such a preference, or they may forbid it; and in all cases where the proceeding is under the State law, the regulations of the State must furnish the rule of decision. Assignments with preferences in favor of certain creditors are held to be valid in this State, as appears by several decisions of the State court; and this court will follow that rule, until it is repealed by competent authority. *Dockray v. Dockray*, 2 R. I. 547; *Beckwith v. Brown et al.*, 2 R. I. 311; *Sadlier et al.*

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v. *Fallon*, 4 R. I. 490. Third, complainants charge, that the assignee was cognizant of the corrupt scheme and combination set forth in the first charge, and that he well knew the fraudulent purpose for which the mortgage and assignment were executed. But the charge is very pointedly denied in the answer, and the complainants offer no satisfactory proof in support of it; and under those circumstances they can hardly expect a finding in their favor. Finally, the complainants charge, that the debtor, upon the execution of the mortgage deed and the assignment, continued to treat the property conveyed as his own, and that he was allowed to do so by the respondents. But they fail to prove the charge, and it is very explicitly denied in the answer.

In view of the whole evidence, I am of the opinion that the complainants have failed to prove any one of the charges against the respondents, and the bill of complaint is accordingly dismissed with costs.

JUNE TERM, 1862.

RUFUS J. STAFFORD v. THE PAWTUCKET HAIR-CLOTH COMPANY.

Where damages awarded by a jury are excessive, the error may in many cases, and under most circumstances, be obviated by remitting the amount of the excess; but where the circumstances clearly indicate that the jury were influenced by prejudice, or by reckless disregard of the instructions of the court, that remedy cannot be allowed.

Where such motives and influences appear to have operated on the jury, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding.

Excessive damages having been the foundation of the opinion of the court setting aside the verdict of a jury, and the verdict having exceeded in amount the damages laid in the writ, a *remittitur* is not the proper remedy, but a new trial should be granted.

ACTION to recover damages for the infringement of a patent on an improvement in hair-cloth looms. Defendants pleaded the general issue, and gave notice that they should prove the com-

plainant not to be the original and first inventor of the improvement.

Pitman, District Judge, presided at the trial, which was had at the November Term, 1860, and charged the jury. Verdict for complainant for the sum of \$ 2,500.

A motion for new trial was made, and the cause came before the court upon that motion. Numerous exceptions were taken to the instructions given to the jury by the judge presiding at the trial; and the rejection of the verdict was also asked upon the ground of excessive damages awarded by the jury, as indicating prejudice upon their part, or misapprehension of the case. The only reason for setting aside the verdict, distinctly announced in the opinion of the court, was that of the amount of damages.

B. F. Thurston, for plaintiff.

Bradley and Metcalf, for defendants.

CLIFFORD, J. A new trial is asked, among other reasons, because the damages awarded by the jury in the cause are excessive, and indicate a total misapprehension of the case, and the evidence in this regard, as shown by the report of the evidence.

In substance and effect the charge of the court directed the jury to confine their attention to one machine, and they were expressly told that the court could see no particular proof of actual damages. Looking at the whole case, it is quite clear that the damages are greatly excessive, and plainly the finding was without sufficient evidence to justify it, and contrary to the charge of the court. Such errors may in many cases and under most circumstances be obviated by remitting the amount of the excess, but where the circumstances clearly indicate that the jury were influenced by prejudice or by a reckless disregard of the instructions of the court, that remedy cannot be allowed. Where such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding.

After careful consideration of the evidence and the circumstances of the trial, we are constrained to come to the conclusion that the case falls within the latter rule. Parties have a right to

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an impartial trial, and where the finding of the jury is so excessive, and so wholly opposite to the charge of the court, it is not possible to say that the requirements of the law in that behalf have been fulfilled.

In view of the whole case we are of the opinion that the verdict must be set aside and a new trial granted.

On a subsequent day of the term, the court pronounced the following additional opinion in this case: —

CLIFFORD, J. Since the order of the court setting aside the verdict and directing a new trial in this case, it has been suggested by the plaintiff that the opinion of the court given on the occasion contains an error of fact. Regarding the suggestion as a very proper one, we have reviewed the matter and are satisfied that the suggestion is well founded. Evidence was offered by the plaintiff tending to show that the corporation defendants had used some sixty or more machines embracing the principle embodied in the machine of the plaintiff; but the error of fact is not of a character to affect the judgment of the court. Excessive damages was the foundation of the opinion of the court, and the error of fact now corrected is only one of the reasons which led the court to that conclusion. Considering that the verdict exceeded the damages laid in the writ, we are still of the opinion that the order made was correct, and that a *remittitur* is not, under the circumstances, the proper remedy. Parties have a right to a full and impartial trial, and we are not satisfied that the requirement has been fulfilled.

Let the entry stand as originally directed.

MASSACHUSETTS DISTRICT.

OCTOBER TERM, 1862.

MICHAEL SWEENEY *et al.*, Libellants *et* Appellees, *v.* JOHN CLOUTMAN.

Certain mariners contracted orally with the master of a fishing-vessel to serve as fishermen during a specified time, and for a certain rate of wages in money, and, in pursuance thereof, went on board the vessel. Some days afterward, and while she was fitting for the voyage, at the master's request the men signed certain articles which, among other things, contained a "shares" clause, but without reading the articles or being informed of the purport thereof. *Held*, that the mariners were entitled to recover wages in conformity with the oral agreement, and that such oral agreement was not merged in the subsequent written one.

ADMIRALTY appeal in a cause of subtraction of seamen's wages. The libellants were seamen belonging to the schooner John G. Cowell, and were employed during the season of 1860 on a codfishing voyage from Marblehead to the Grand Banks. The master's name was Thomas Hanrahan, and the respondent was the owner of the vessel. It was set forth in the libel, which was filed on the 9th of December, 1861, that the libellants shipped in Boston, on the 28th of April, 1860, to serve as mariners and fishermen on board the schooner for that fishing season. According to the libel, the first two of the libellants — there were three in all — were to receive \$140 each as wages for the season, and the other \$100 for the same voyage. Accordingly, they alleged, they entered upon the voyage, performed the contract, and returned to Marblehead with the vessel, October 6, 1860, when and where the voyage ended. Having set forth the contract and their performance of the same, they alleged that on their arrival at the home port, they were duly discharged, and became entitled to their wages, but that the respondent refused to pay them.

Ownership of the vessel by the respondent was admitted in the

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answer, as well as the engagement of the vessel in a fishing voyage during the season of 1860, but it was averred that the respondent himself did not hire any of the libellants to serve on board the schooner, at any rate whatever, and that no one of them served thereon in pursuance of any contract for wages in that voyage. It was, however, in effect admitted that the libellants shipped on board the vessel, and also that they performed service on board as mariners and fishermen; but the respondent averred that they entered into a written agreement with the master and the rest of the crew, as required by the act of Congress, to serve for shares of the fish to be caught, and that the whole service performed by them during the voyage was under that agreement, and that no other agreement was made by him with them, or by any person authorized to act for him. A special replication to so much of the answer as set up the written agreement to serve for shares of the catch was filed by the libellants. First, they denied that they ever entered into any written agreement upon the subject either with the master or the respondent, but averred that the only contract they made was an oral one to serve during the fishing season for the wages specified in the libel. Second, they alleged that the written agreement, if any such was signed by them, was invalid, because they were fraudulently induced to sign the same without knowing the contents, or suspecting it was of a character to affect their contract for wages.

The decree in the District Court was in favor of the libellants for their wages, under the oral contract set forth in the libel.

So far as that decree related to two of the libellants, an appeal was taken, and afterwards both sides took additional testimony by which it appeared that the master took charge of the vessel upon the condition that he should be permitted to hire the crew for the voyage, and his testimony contained the declaration that he employed the libellants and agreed to allow them the wages set forth in the libel.

They were actually on board the vessel seven or eight days, during the period she was fitting for the voyage. When the men arrived at Marblehead, the respondent requested to see them, and on their being pointed out to him, he complained because

the master had not procured more able-bodied men, and said he hoped he had not agreed to give them too much money.

C. G. Thomas, for libellants.

As to implied authority of the master to hire the men when no direction is given, see *Baker v. Corey*, 19 Pick. 495; Cur. Rights and Duties of Mer. Seamen, pp. 15–18, § 3, 172, § 3, 336.

R. T. Paine, Jr., for respondents.

The skipper of a fishing-vessel has no implied authority to hire fishermen on wages. 3 Stat. at Large, p. 2; *Baker v. Corey*, 19 Pick. 498.

The evidence is positive, uncontradicted, and admitted by libellants that after their parol bargain for wages, these two libellants signed the written fishing-agreement, to go on shares.

This merged the previous parol bargain. The libellants can only escape from this written agreement by proving fraud.

The burden of proof is on them, the libellants, to prove the six elements of fraud which would be a valid defence to the writing, namely:—

1. False and fraudulent representations.
2. By respondent.
3. To libellants.
4. As to contents and purpose of the writing.
5. To induce them to sign it.
6. That they were thereby induced.

There was no unusual clause in this agreement. An unusual clause in a shipping-paper must be read to the seamen. *Hean v. Rogers*, 1 Sprague's Dec. 556.

The shares clause is the only important one in this case, and being prescribed by 3 Stat. at Large, 2, every man is presumed to know the law.

CLIFFORD, J. Taken as a whole, the testimony shows that the libellants were shipped by the master, and that he contracted to give them respectively the wages specified in the libel, and that the oral contract was never modified or varied in any respect whatever. Express authority to hire the crew upon wages was fully proved by the master, and the circumstances attending their employment, and the conduct and declarations of the respondent

on their arrival at Marblehead, were of a character to satisfy the court that the master's account of the transaction is correct, without adverting to the subsequent conduct of the respondent, which in many respects goes very far to confirm that view of the case. The proof of express authority having been exhibited, it is unnecessary to consider the second proposition submitted by the respondent, which was that the master had no implied authority to make such a contract. But it is insisted by the respondent that the oral contract of the libellants, if made as alleged, was merged in a subsequent written contract, wherein the libellants agreed to serve during the fishing season for shares of the fish to be caught, in the proportions specified in the written agreement. That proposition is based upon the fact that the libellants at the request of the master signed such an agreement three or four days before the schooner departed on her voyage. She sailed on the 25th of April, 1861, which was some seven or eight days after the libellants had arrived at Marblehead, and entered upon the performance of the oral contract under which they agreed to ship for the voyage. Three or four days before the vessel sailed, the master, as he stated, told the crew, including the libellants, that he wanted them to sign the fishing-agreement or paper which he exhibited to them, and he and every one of the crew signed it. Recurring to the paper, it will be seen that it corresponds in all respects with the form of the fishing-agreement usually adopted where the master and crew are shipped to serve for shares of the fish caught during the season or voyage; but the instrument was never read to them, and the facts and circumstances show to the entire satisfaction of the court that the paper was never executed and delivered as an agreement to determine and control the wages either of the master or the crew. Circumstances strongly indicate that it was executed in connection with some purpose, contingent or otherwise, to perpetrate a fraud upon the government, but the evidence fails to disclose any grounds to conclude that the libellants or any of the crew were parties to any such fraudulent purpose. They appear to have acted heedlessly in signing the paper, but without any knowledge of its contents, and without the slightest

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suspicion that it had any relation to their contract. They made no inquiries in regard to the paper, and no explanations were given, and the whole case shows that the paper was not executed or intended by either party as one to show the terms of the contract of shipment, and was never delivered as such by the libellants, or received as such by the respondent. To hold otherwise would be to sanction a fraud upon the libellants, and to impute a fraudulent purpose to the respondent not warranted by any evidence in the case. He well knew that the libellants had been shipped upon wages, and he also knew that they so understood the contract, and there is no just ground to believe that he caused the paper to be signed with any view to discharge or modify the contract.

The decree of the District Court is therefore affirmed with costs.

IN THE MATTER OF WILLIAM H. WINDER, Petitioner for a Writ
of Habeas Corpus.

Courts of justice may refuse to grant the writ of habeas corpus where no probable ground for relief is shown in the petition, or where it appears that the petitioner is duly committed for felony or treason plainly expressed in the warrant of commitment.

But where probable ground is shown that the party is in custody under or by color of the authority of the United States, and is imprisoned without just cause, and therefore has a right to be delivered, the writ of habeas corpus then becomes a writ of right, which may not be denied.

The service of the writ in this case was prevented by force. The writ was ordered to be placed on the files of the Court, to be served when and where its service might become practicable.

THIS was a petition for a writ of habeas corpus. The circumstances of the case are fully set forth in the petition and the opinion of the court.

To the Honorable Nathan Clifford, an Associate Justice of the Supreme Court of the United States, sitting in the District of Massachusetts: —

The petition of William H. Winder respectfully represents, that he is and always has been a loyal citizen of the United

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States, and was a resident of the Commonwealth of Pennsylvania until the time of the arrest and restraint hereinafter mentioned, and has been for a long time past confined in Fort Warren, a military fort of the United States within the district of Massachusetts, under the command of Colonel Justin Dimmick, where and by whom he is illegally restrained of his liberty.

That your petitioner whilst so resident in the Commonwealth of Pennsylvania was arrested at his residence in the city of Philadelphia upon the 11th day of September, A. D. 1861, under a warrant purporting to be issued by a United States Commissioner, upon a charge of conspiracy to overthrow the government of the United States, under the act of Congress of the 13th July, 1861.

Your petitioner avers that he was entirely innocent of this charge, or of any other offence against the United States, and at once urged an immediate hearing of the case, which was refused, upon the alleged ground of other engagements of the United States Attorney, and the hearing was postponed to the afternoon of the 13th September, 1861, your petitioner remaining in custody.

Your petitioner was again present at the day to which the hearing of his case was adjourned, ready and anxious to meet the charge against him, when, after a considerable delay, the United States Attorney stated that he had no charge to prefer against your petitioner. He then said that an order had been received for your petitioner's delivery to the United States Marshal, and your petitioner was discharged by the Commissioner; and a telegraphic message, of which the following is a copy, was produced and handed to the counsel of your petitioner, who was present with him : —

Dated Wash'g Sept. 11, 1861..

To Geo. A. Coffey, U. S. District Attorney.

Have telegraphed Marshal Millward to arrest Wm. H. Winder and transfer him to Fort Lafayette.

S. CAMERON, Secretary of War.

In the Matter of William H. Winder.

Your petitioner was then at about 5 o'clock of the afternoon of September 13, 1861, without any warrant or cause of commitment being exhibited or stated either to him or to his counsel, immediately seized and taken into custody by William Millward, United States Marshal for the Eastern District of Pennsylvania, and was on the same afternoon removed to the city of New York by a person believed to be a deputy or officer of said Marshal, and upon reaching the city of New York was carried to Fort Lafayette, a military fort of the United States, under an order, a copy of which he has since obtained, and which is as follows : —

PHILADELPHIA, Sept. 13, 1861.

Lieut.-Col. Martin Burke, commanding Fort Hamilton.

DEAR SIR, — Permit me to introduce to you my deputy, Mr. Sharkey, who carries with him Mr. Winder, to be delivered to your custody, per order of Secretary of War.

Very respectfully, your ob't servant,

WM. MILLWARD, U. S. Marshal.

Your petitioner avers that neither at the time of his said arrest, nor at any time since, has he ever seen the said order or pretended order of the Secretary of War, which, for reasons hereinafter stated, he believes never existed.

Your petitioner remained so unlawfully restrained of his liberty in Fort Lafayette, under color of some order or pretended order of the Secretary of War or some other person, until some time towards the end of October or beginning of November, 1861, when he was transferred, under some order or direction to him unknown, to Fort Warren, near Boston, a military fort of the United States under command of Colonel Justin Dimmick, in which place he has ever since been detained in custody, and now is unlawfully restrained of his liberty. Ignorant of the cause of his unlawful arrest and detention, and conscious of entire innocence, your petitioner addressed a letter to the Secretary of State upon the subject of his imprisonment, of which the following is a copy : —

In the Matter of William H. Winder.

FORT WARREN, 5th Dec. 1861.

To the Hon. W. H. SEWARD, Secretary of State.

SIR, — In accordance with your letter of instructions, read to the parties confined in this fort, to address you directly in relation to their release, I proceed to do so, relying upon the implied assurance of your letter, that these communications will receive your personal attention and reply. I have been confined now nearly thirteen weeks, and during all that time I have been unable to learn of any charge whatever; consequently, I can only state that I am unconscious of word or act inconsistent with the character of a true American citizen; and hence I infer that my arrest did not emanate from the head of a department, and that the names of such, when employed in this matter, were merely *pro forma*, without attention to, and probably without knowledge of, the document to which they were attached.

In this state of affairs, I will respectfully submit to your consideration the propriety of allowing me, on parole, to visit Washington for the examination of my case, and I will add my conviction that a short interview will satisfy you of some error in my arrest and confinement, which have proved seriously detrimental.

Should the granting the parole prove to be inconsistent with your purposes, I trust I shall not be disappointed in my expectation of receiving a statement of any charges against me, fully, specifically, and with all the evidence in possession of the department, together with the names of all parties making charges.

Respectfully, your obedient servant,

W. H. WINDER.

No answer was ever received by your petitioner to this letter, and time rolling on, and remaining in his original ignorance of the cause of his unlawful imprisonment, your petitioner addressed a letter, of which the following is a copy, to the Secretary of War: —

I have been held in confinement in Forts Lafayette, N. Y., and Warren, Mass., without process or form of law, now more than five months, having been arrested in Philadelphia, my residence,

from whence, by order of Simon Cameron, Secretary of War, by telegraphic despatch, I was transferred to those distant points.

Immediately upon my arrest, in my absence, my office, desks, and chests, &c., were all broken open, and all my papers, a collection of thirty years, ransacked, on pretence of hunting treasonable matter during the few months previous; the sanctity of private correspondence was violated and malignantly calumniated by the publication of pretended contents of letters thus seized; other parties were also thus grievously slandered by statement of falsely alleged contents, and I debarred of all opportunity to contradict such infamous publications. My letter-books, writings, and letters are still in possession of public officials. Even pictures twenty years old found in my possession were misrepresented to slander me. My correspondence at Philadelphia since my arrest has been intercepted and detained.

I am to this hour in ignorance of the causes of my arrest and detention. Governor Seward, Secretary of State, caused an order of his to be read to the prisoners; in which he stated that the employment of paid counsel would only have the effect of prejudicing the case of such parties, would be deemed an offence, and would occasion procrastination of imprisonment; his order required all applications to be addressed directly to him, or through unpaid parties.

In accordance with this order, never having employed counsel, on the 5th December last, I addressed a letter to the Secretary of State, in which, referring to his order as giving assurance that he would read and reply to our communications, I proceeded to state my long confinement, my ignorance of the causes therefor, and requesting permission to go to Washington for an investigation of my case, or for a statement of the charges against me, if any, the full testimony, and the names of my accusers, or else an unconditional discharge. To this hour no reply has been received.

My release was tendered to me on condition of taking the oath of allegiance, &c., &c. I declined to accept release upon conditions. A second time release was offered upon condition of taking the oath, which offer was accompanied by a letter of

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explanation from Governor Seward, intended to remove supposed objections, in stating that support of the Constitution did not include support of the individual members of the executive. My objection, being radical, applied to all tests or conditions, which might be supposed to admit that I had done anything inconsistent with the character of a true American, and I of course declined this second offer of release.

In common with my fellow-members of the company to which I am attached, I took an oath to support the Constitution, and I am still under its full responsibility. I am ready in common with all others, on every proper and lawful occasion, to take it a thousand times. But as a discriminating test, imputing past and future intended wrong, it is not possible for me thus voluntarily to calumniate myself. The interior of Fort Warren, with the *mens sibi conacia recti*, is preferable to release purchased at the expense of character. So far from being willing thus to calumniate myself, I have challenged and I do now challenge a comparison of record of fidelity to the Constitution and the Union with all concerned in my arrest and detention, confident that the result will furnish none of them with cause for self-gratulation.

In this state of the case, the Secretary of War announces that the President will grant "amnesty" for past offences and take "parole" against future ones, of all persons "except spies in the service of the insurgents, or others whose release at the present moment may be deemed incompatible with the public safety."

Thus I should be turned loose, stained with an unnamed guilt of the past, supposed to be covered by the "amnesty," and the equally nameless guilt of the future, averted by the "parole," allowing a censorious world to impute any wrong it may please, as being concealed beneath the cloaks of "amnesty" and "parole," and to which, by my acceptance, I would give at least a quasi admission, and certainly would leave upon myself the color of guilt, and without power of vindication against such imputation.

The "spies" and those whose liberation may be "deemed incompatible with the public safety" will have probably the oppor-

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tunity of perfect vindication, while those favored with "amnesty" and "parole" will stand forever shaded beneath those clouds.

It would seem to be an exquisite aggravation of the original wrong which the order admits and purports to remedy or correct. The wrong done was illegal incarceration without charge; the remedy now proposed is to confess that wrong had been done, and to receive "amnesty" therefor; to acknowledge intention to do future wrong, and then to give "parole" to forego such intention.

The condition, in a Northern State, of a man accepting "amnesty" and giving "parole," would be a confession of guilt bearing in its train intolerable consequences. For these reasons, and many others which naturally present themselves, and would be stated if necessary, the undersigned trusts the Secretary of War will find it consistent with his duty to reinstate him at home to his original position before arrest.

If there be any charge of crime against me, I am ready to meet it. If there be none, I trust the Secretary will see that to impose conditions on me as the price of my liberation, is to aggravate the wrong which will then stand confessed.

It might be simple justice, alike to the administration as to the prisoners, to have the informers who misled the defendant exposed to view and to just punishment.

I have the honor to be

Your obedient servant, W. H. WINDER.

FORT WARREN, 22d Feb'y, 1862.

Hon. E. D. STANTON, Secretary of War, Washington City.

Your petitioner's books and papers had all been seized and taken by the Marshal, at the time of his arrest; but having been, previously to his arrest, in correspondence with Gen. Simon Cameron, and believing it to be impossible that that officer would, of his own motion, have authorized his arrest, he wrote to him upon the 15th March, 1862, as follows:—

FORT WARREN, 15th March, 1862.

Hon. SIMON CAMERON.

Sir,—It was by order from you, through a telegraphic de-

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spatch, that I was taken from Philadelphia to Fort Lafayette and placed in confinement there, from whence I was transferred to this fort, in which I am confined, still ignorant of the cause which induced you to issue that order. The object of my writing this letter is to obtain from you information at whose instance and upon what representations you were influenced to the issue of the order for my confinement in Fort Lafayette. I believe I do not err in supposing the order could not have been of your own motion, but was upon the statement of party or parties who ought not, and who you supposed would not, willingly mislead you, and I trust that my reliance on your readiness to afford me the information will not prove delusive. I feel myself entitled to this consideration at your hands, and am unwilling to doubt your inclination to accord it to me.

I am, respectfully,

Your obedient servant, &c.,

W. H. WINDER.

To this letter an answer was received, as follows : —

LOCHIEL, March 24, 1862.

W. H. WINDER, Esq.

Sir, — You surprise me by saying in your letter of the 15th inst., received to-day, that it was by my order you were taken from Philadelphia to Fort Lafayette and placed in confinement. I knew nothing of your arrest until I saw the fact stated in the newspapers, and, being at the time closely engaged in the discharge of my official duties, neglected to inquire into the cause, presuming, however, that it was done by order of the State Department, which had charge of such cases as I supposed yours to be.

Very respt'y,

SIMON CAMERON.

And the following further correspondence took place between your petitioner and Gen. Cameron : —

FORT WARREN, 31 March, '62.

HON. SIMON CAMERON, Lochiel, near Harrisburg.

SIR, — I have to thank you for your prompt reply to my re-

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quest for information as to the causes which induced you to issue an order for my transfer to Fort Lafayette. Your reply of the 24th, stating your surprise at learning that I had been sent there by your order, and that you knew nothing of my arrest until you saw it in the papers, and presumed it had been done by order of the State Department, confirms me in my supposition that your name had been used either without your knowledge or inadvertently signed to a paper without heeding its contents. It was obtained somehow through the district attorney. I give you a copy of the document on which Col. Burke took charge of me and placed me in Fort Lafayette : —

PHILADELPHIA, Sept. 13, 1861.

Lt.-Col. MARTIN BURKE, commanding Fort Hamilton.

DEAR SIR, — Permit me to introduce to you my deputy, Mr. Sharkey, who carries with him Mr. Winder, to be delivered to your custody, per orders of Secretary of War.

Very respectfully, your ob't servant,

WM. MILLWARD, U. S. Marshal.

I am respectfully, your obedient servant,

W. H. WINDER.

FORT WARREN, 31 March, 1862.

Hon. SIMON CAMERON, Lochiel, near Harrisburg.

DEAR SIR, — Since writing you to-day I have received the following copy of despatch from Philadelphia : —

WASHINGTON, Sept. 11, 1861.

To GEO. A. COFFEY, U. S. Dist. Att'y.

Have telegraphed Marshal Millward to arrest Wm. H. Winder and transfer him to Fort Lafayette.

S. CAMERON, Sec'y War.

I have supposed this might call to your mind the communication of Mr. Coffey to which apparently it is a reply.

I am respectfully, your obedient servant, &c.

W. H. WINDER.

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LOCHIEL, 2 April, 1862.

W. H. WINDER, Esq.

SIR, — I have enclosed your letter of the 31st, received to-day, to the Secretary of State, and disavowed all knowledge of your arrest, with a request for your release, if you have been held by my direction. Very respectfully,

SIMON CAMERON.

FORT WARREN, 5th April, 1862.

Hon. S. CAMERON, Lochiel, near Harrisburg.

DEAR SIR, — I have been much gratified by the receipt of your letter of 2d April, in which you advise me of your having sent my first letter of 31st March to the Secretary of State, with a request for my release, if I have been held by your direction. This is satisfactory, and is all the action the case requires at your hands, unless, indeed, a disregard of your request should render it proper for your own vindication against an act which you repudiate, but the responsibility of which is placed by the record on your name. I am, respectfully, your ob't serv't, &c.,

W. H. WINDER.

It thus appears that no order was ever given by the Secretary of War for the arrest of your petitioner, and he was left in absolute darkness as to the authority, or supposed authority, by which he was originally imprisoned and was then detained.

In the month of May last, commissioners to visit and report upon the cases of those who had been arrested and were detained in the military prisons of the United States, came to Fort Warren, and your petitioner was summoned to appear before them. Then for the first time, and nearly eight months after his arrest, upon the 7th May, 1862, your petitioner was informed that his offence was his correspondence and his writings for the newspapers. Your petitioner at once demanded the production of any writings of his upon which any charge of violating the laws of the United States could be based. None such were produced, and your petitioner now asserts what he has before stated, that none such can be produced.

Your petitioner was then told by the commissioners that his case would be taken into consideration, but he has never heard

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further from them upon the subject, nor has any offence been since ever imputed or stated to him, or the reason of his arrest and detention, nor has, so far as he is aware, any further or other action ever been taken in regard to him or his case.

Your petitioner avers that he has now been nearly fourteen months unlawfully restrained of his liberty, and detained in custody under color of some pretended authority of the United States, without any specific crime or offence under or violation of its laws being imputed to him, in disregard of the plain provisions of the laws and Constitution of the United States, to the benefit of which the humblest citizen is entitled. Your petitioner now solemnly reasserts what he has heretofore more than once stated, that he is innocent of any crime or offence against his country or its government and laws, and he respectfully prays your honor to grant a writ of *habeas corpus* to be directed to Col. Justin Dimmick, commandant of Fort Warren, and to his officers having charge of your petitioner, commanding him and them to bring your petitioner before your honor, to do, submit to, and receive what the laws may require. And he will ever pray, &c.

W. H. WINDER.

By his agent and attorney,

GEORGE W. BIDDLE.

Boston, October 25th, 1862.

Wm. B. Reed, Geo. W. Biddle, Peter McCall, and Geo. S. Hillard, for petitioner.

CLIFFORD, J. This is a petition for a writ of *habeas corpus*, wherein the petitioner represents that for a long time past he has been confined in Fort Warren, a military fort of the United States, in this district, under the command of Colonel Justin Dimmick, where and by whom he is illegally restrained of his liberty.

As a foundation of the application, and to show that the prayer of the petitioner ought to be granted, he alleges that he is and always has been a loyal citizen of the United States, and that until the time of his arrest, as therein set forth, he had been a resident of the Commonwealth of Pennsylvania, and the complaint is, that while he was so resident there he was, on the 11th of September, 1861, arrested at his residence in the city of

Philadelphia, under a warrant purporting to have been issued by a commissioner of the United States, upon a charge of conspiracy to overthrow the government of the United States.

According to the petition that warrant was founded upon the act of Congress of the 13th of July, 1861; but the petitioner avers that he was entirely innocent of that charge or of any other offence against the United States; that he urged an immediate hearing of the case on the day of his arrest, which was refused on the ground that the district attorney had other engagements, and the same was postponed to the 13th of the same month, when he was again present, and ready and anxious to meet the charge, but that the district attorney, after stating that he had no charge to prefer against him, informed him that an order had been received that he should be delivered to the marshal of the United States for that district; that he was accordingly discharged by the commissioner, and was then and there, without any warrant or cause of commitment being exhibited to him or to his counsel, immediately seized and taken into custody by William Millward, marshal of that district. When the district attorney, however, informed the petitioner that an order had been received that he, the petitioner, should be delivered to the marshal, he at the same time, as the petitioner states, handed to his counsel, who was present with him, a telegraphic despatch, addressed to the district attorney, of the following purport:—

Have telegraphed Marshal Millward to arrest Wm. H. Winder, and transfer him to Fort Lafayette.

S. CAMERON, Sec'y of War.

Recurring to the copy of the telegram as given in the petition, it will be seen that it was dated at Washington on the 11th of September, 1861, two days before the petitioner was taken into custody by the marshal; and the petitioner states that on the same afternoon that he was so seized, he was removed to the city of New York, by a person believed to be a deputy or officer of the marshal, and upon reaching that city was carried to Fort Lafayette, a military fort of the United States, under an order of which the following is a copy:—

Permit me to introduce to you my deputy, Mr. Sharkey, who carries with him Mr. Winder, to be delivered to your custody per order of the Secretary of War.

Said order or letter was dated at Philadelphia on the 13th of September, 1861, and was addressed to the commandant of Fort Hamilton, and was signed by the marshal.

Having stated these proceedings, the petitioner avers that he has never seen the order or pretended order of the Secretary of War, and, for reasons set forth in the petition, he does not believe that any such order ever existed, but that he remained in Fort Lafayette, so unlawfully restrained of his liberty, under color of some order or pretended order of the Secretary of War or of some other person, until some time towards the last of October or the first of November, 1861, when he was transferred, under some order or direction to him unknown, to the military fort before mentioned in this district, under the command of Colonel Justin Dimmick, in which place he has ever since been detained in custody, and now is unlawfully restrained of his liberty.

On the 5th of December, 1861, he addressed a letter to the Secretary of State, soliciting leave to visit Washington, on parole, for the examination of his case, or that he might be furnished with a statement of the charges against him; but as no reply was received to the communication, it will not be reproduced at the present time. Failing to get any reply to that letter, on the 22d of February, 1862, he addressed another letter to the present Secretary of War, but, so far as appears, the communication was never answered. Believing it to be impossible that the former Secretary of War, General Simon Cameron, would of his own motion have authorized his arrest, the petitioner states that he, on the 15th of March, 1862, wrote to General Cameron upon the subject, informing him that it was by his order that he, the petitioner, was seized and taken from Philadelphia to Fort Lafayette, and there placed in confinement, and afterwards transferred to Fort Warren, and inquired at whose instance and upon what representations he had been induced to issue the order.

To that letter, as the petitioner states, a reply was received under date of the 24th of March, 1862; and he gives what pur-

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ports to be a copy of the answer. Suffice it to say, without attempting to give the precise language, the writer expresses his surprise at the remark of the petitioner that it was by his order that he had been taken from Philadelphia to Fort Lafayette and placed in confinement. On the contrary, he expressly states that he knew nothing of the petitioner's arrest until he saw the fact stated in the newspapers, and adds several circumstances confirmatory of that statement. Confirmed by that letter in the opinion that the name of the former Secretary of War had been used without his knowledge, or inadvertently, the petitioner states that on the 31st of the same month, he wrote General Cameron another letter, thanking him for his prompt reply, and furnished him with a copy of the document under which the commandant of Fort Hamilton took charge of him and placed him in Fort Lafayette, and also a copy of his telegraphic despatch to the district attorney, which was handed to his counsel at the time he was discharged by the commissioner. Considering that the reply of General Cameron is a brief one, it will be given in the language of the copy set forth in the petition.

LOCHIEL, April 2, 1862.

W. H. WINDER, Esq.

SIR, — I have enclosed your letter (of the 31st) received to-day, to the Secretary of State, and disavowed all knowledge of your arrest, with a request for your release, if you have been held by my direction.

Very respectfully,

SIMON CAMERON.

Various other matters are stated in the petition, which need not be particularly noticed at this stage of the case, except to say that the petitioner, in conclusion, avers that he has been nearly fourteen months unlawfully restrained of his liberty, and detained in custody, under color of some pretended authority of the United States, without any specific crime or offence being imputed to him, in disregard of the plain provisions of the Constitution of the United States and the laws of Congress, to the benefit of which every citizen is entitled; he accordingly prays the court to grant this writ of *habeas corpus*.

By the fourteenth section of the act of the 25th of September, 1789, it is provided, among other things, that either of the justices of the Supreme Court of the United States, as well as the judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of commitment; provided, that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify. Additional authority upon the subject is also conferred by subsequent acts of Congress, but it is unnecessary to refer to any other act, as the petition in this case is obviously founded upon the before-mentioned provision of the Judiciary Act.

Courts of justice may refuse to grant the writ of *habeas corpus* where no probable ground for relief is shown in the petition, or where it appears that the petitioner is duly committed for felony or treason plainly expressed in the warrant of commitment; but where probable ground is shown that the party is in custody under or by color of the authority of the United States, and is imprisoned without just cause, and therefore has a right to be delivered, the writ of *habeas corpus* then becomes a writ of right, which may not be denied, but ought to be granted to every man who is committed or detained in prison or otherwise restrained of his liberty. Authorities in support of these positions are unnecessary, as wherever the principles of the common law are adopted or recognized they are universally acknowledged.

Although the petitioner was arrested, in the first place, by virtue of a warrant issued by a commissioner of the United States, still the case, as stated in the petition, shows that he was discharged from that arrest, and that no warrant of any kind has since been issued against him. Assuming the case to be as stated in the petition, he was not only arrested and imprisoned under an order having no other sanction than that of a telegraphic despatch, but it now appears from the petition that the Secretary of War, who was supposed to have sent or authorized the telegram containing the order, denies all knowledge of the arrest of the

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petitioner, except as he learned the fact from the newspapers, and entirely disavows all responsibility for the proceedings.

Nothing need be added to the narrative of the facts as set forth in the petition, to demonstrate that the petition shows probable ground to conclude that he is imprisoned and restrained of his liberty without just cause. Undoubtedly he is in custody under or by color of authority of the United States, and such being the fact, all the requisites known to the law are shown to entitle the petitioner to the writ for which he prays; and on that state of the case, it becomes the duty of the court to grant it. When these pre-requisites appear, it is not competent for the court to deny the application, because the court has in such case no discretion upon the subject, but the writ must issue as a matter of right.

All these remarks must be understood as based entirely upon the facts as stated in the petition, and, of course, can have no application to any different state of facts which may be shown upon the return.

The United States marshal having declined to serve the writ, it was placed in the hands of B. F. Bayley, a deputy sheriff, who made the following return thereupon:—

I, Benjamin F. Bayley, being duly sworn, do depose and say that I am one of the deputies of the sheriff of the county of Suffolk, in the Commonwealth of Massachusetts; that on Tuesday, the 28th day of October, A. D. 1862, there was placed in my hands for service a writ of *habeas corpus*, a copy of which is hereto annexed, directed to Colonel Justin Dimmick, commandant of Fort Warren, or to any officer under him having the charge of William H. Winder, commanding him to bring the body of said Winder, then confined in said Fort Warren, to be dealt with as to law and justice should appertain; that upon receiving said writ, I immediately proceeded to Commercial Wharf, in the port of Boston, where the steamboat plying between the said port and said Fort Warren was lying, and stated to the captain in charge of said boat, that I desired to proceed therein to Fort Warren as a messenger from the United States

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Court, with papers for said Colonel Justin Dimmick. The said captain told me that his orders were positive not to allow any one to go in said boat without a pass from Colonel Dimmick, said orders having been received on Friday last, the 24th instant ; that being prevented from proceeding in said boat, I did on the morning of Wednesday, the 29th day of October, 1862, receive from the counsel of said Winder, certain instructions in regard to the service of the said writ of the following tenor : —

You are entrusted with the service of a writ of *habeas corpus*, issued by order of the Honorable Nathan Clifford, a justice of the Supreme Court of the United States, to be served upon Colonel Justin Dimmick, at Fort Warren.

You will have with you the original writ, with an attested copy thereof.

You will procure a proper conveyance to take you to Fort Warren, and land there in order to serve the writ as directed.

Upon landing or meeting the sentry, or other person at the fort whom you may first meet, you will respectfully inquire for Colonel Dimmick, stating you have a paper to deliver to him from Judge Clifford, a judge of the Supreme Court of the United States.

Should you be allowed to see Colonel Dimmick, you will respectfully deliver to him the original writ, saying at the same time, This is a writ from Judge Clifford, and at once return to Boston, when you will draw up a statement of the time and mode of service.

Should the sentry or party with whom you first communicate refuse you permission to see Colonel Dimmick, you will ask by what authority you are refused ; if none is stated, and the refusal be persisted in, you will hand a copy of the writ to the sentry or other party, asking him to deliver it to Colonel Dimmick, saying you will wait for an answer, and bring it if received. If this be refused, you will return at once.

Should you be refused permission to land, and the refusal be persisted in upon your stating that you have a paper for Colonel Dimmick, you will at once return and make a report of what you have done.

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Should Colonel Dimmick be absent from the fort, you will communicate or endeavor to communicate with the officer in command, in the manner hereinabove set forth.

That upon receiving said instructions I hired a sail-boat in the port of Boston aforesaid, manned with two men, and was accompanied by John H. Clark, a reputable citizen of the county of Middlesex, in this Commonwealth, and proceeded therein to Fort Warren, to serve the said writ according to my instructions; that I arrived near to said Fort Warren, at about three o'clock of the afternoon of said 29th day of October, when I perceived a body of about fifty armed men drawn up in military array near the place of landing; that upon nearing the landing I was hailed by a sentinel and told by him to keep off; that I then told said sentinel that I had a communication to make to Colonel Dimmick, and approached a little nearer to said landing; that the said force was then marched down to the landing, when I was again peremptorily ordered by a person in command of said force, to keep off, and was prevented from landing; that finding it impossible to land or approach nearer to the said fort, I directed the boat, in which I was, to be put about, and returned to the port of Boston, where I arrived at about five o'clock of the afternoon of the same day, having been forcibly prevented from serving the said writ; that I verily believe that had I attempted to effect a landing at said Fort Warren, after having been warned away, as hereinbefore stated, I should have been prevented from so doing by the force of armed men drawn up at the landing, and that to the best of my belief it was impossible for me to land and serve the said writ. And that further I say not.

BENJ. F. BAYLEY.

Sworn and subscribed this 30th day of October, A. D., 1862.

G. S. HILLARD, Justice of the Peace.

Mr. Reed then addressed the court as follows : —

May it please your Honor. Having presented to the court this affidavit, the counsel for the relator beg leave to say that we came to this jurisdiction to solicit the process of the law in order to release from a long and, as we believe, unlawful imprisonment

(for nearly fourteen months), a fellow-citizen of Pennsylvania. We deferred any action until the district attorney should have full opportunity of communicating with the authorities at Washington. We came prepared, and anxious to meet and discuss any grave questions of law which the officers of the government might raise in opposition to this discharge. The court granted the writ of relief which was asked for, but its execution has been evaded and resisted, so as to prevent the consideration and decision of these questions. In the case decided by the chief justice of the United States, that of Merriman, the military officer to whom the process was directed, made a return in form respectful ; and this, too, at a time of local disturbance and on the edge of actual war. But here in Massachusetts, many hundred miles away from any scene of war, where perfect peace reigns, and every peaceful relation of life is maintained, and the court is regularly transacting the ordinary and profitable business of the government, here in Massachusetts, the writ which your Honor granted is both evaded and resisted, and an imprisoned American citizen is denied the common right of knowing who are his accusers and of what he is accused. Your Honor's writ is that of the United States, and that peaceful writ the military force of the government prevents us from executing. At this moment we can do no more. We submit the facts this affidavit discloses. We beg to express to your Honor our high sense of the kindness and consideration we have received at your hands, in this effort to assert the supremacy of the law and the rights of the citizen.

CLIFFORD, J. The court does not perceive that anything more can now be done to effect service of this writ. The service appears to have been prevented by force. The court deeply regrets that officers of the United States should obstruct process out of a court of the United States, especially this process. But those officers are at present beyond the control of the law, and the court has not the command of the physical force needful to effect a service of this writ at the present time. Let the writ be placed on file, to be served when and where service may become practicable.

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A patent is *prima facie* evidence that the patentee is the original and first inventor of what he has therein described as his invention; and when taken in connection with his original application, is *prima facie* evidence that the invention was made at the time the application was filed.

But when a patentee proposes to show that his invention is of a date prior to his original application, he takes the burden of proof upon himself, and to maintain that theory as against a patented machine, he must prove, not only that he made his invention at the period claimed, but that he reduced the same to practice in the form of an operative machine; and if he fails to prove either of the elements of the proposition, the verdict should be for the opposite party.

Where a plaintiff claimed that he had invented a particular device, constituting a part of a machine, but it appeared that he subsequently took it out of his model and finally substituted another for the same purpose, and did not include it either in his draft of an application for a patent or his model or *caveat*, and that he never attempted to restore it, until he had seen the invention of the other party, *held*, that those facts were evidence of abandonment for the consideration of the jury.

Desertion of an invention, consisting of a machine never patented, may be proved by showing that the inventor, after he had constructed it and before he had reduced it to practice, broke it up as something requiring more thought and experiment, and laid the parts aside as incomplete, provided it appears that those acts were done without any definite intention of resuming his experiments and of restoring the machine with a view to apply for letters patent.

Jurors are bound in a suit to recover damages for the infringement of a patented invention, to follow and correctly apply the instructions of the court as to the construction of the respective claims of the patent; and where they do not do so, the verdict will be set aside and a new trial granted, if a motion to that effect is seasonably filed.

Where nominal damages were claimed by the plaintiff for the infringement of a patent on a sewing-machine, and the evidence showed that the defendant had sold but one machine, and the court instructed the jury to return only nominal damages, it was *held*, that a verdict for \$500 was excessive, and that this error could not be obviated by allowing the prevailing party to remit the excess.

Such course may be adopted in cases where the court is satisfied that the error has resulted from oversight or mere inadvertence; but where, as in this case, the finding is not only contrary to the evidence, but in direct contravention of the instructions of the court, the difficulty cannot, in general, be remedied in that way.

Irregularity on the part of the party charged, or misconduct of the jury, must be satisfactorily proved, in order to lay the foundation for the interposition of the court.

In that state of the case it is sufficient that the irregularity appears to be of such a character that it might have affected the impartiality of the proceedings.

Any improper interference with jurors may afford sufficient grounds for granting a motion for new trial; and it is not necessary that the attempt to influence the jurors should be made by one of the parties, nor even by his agent.

It is sufficient if it clearly appear that it was done in the behalf of one of the parties; and it is never indispensable to show that the misconduct controlled or determined the verdict.

On a motion for new trial, strong ground to conclude that the plaintiff knew what the

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result would be, before the verdict was rendered, and disregard of the instructions of the court by the jury, as to the merits of the controversy and the measure of damages, are facts and circumstances sufficient to produce conviction in the mind of the court that the parties have not had an impartial trial agreeably to law. .

TRESPASS on the case for the infringement of letters-patent dated March 7, 1854, for a new and useful improvement in sewing-machines. The patent was reissued February 6, 1856. Suit was commenced April 28, 1856. Defendant pleaded the general issue, and filed certain specifications of defence denying that the machine sold by him infringed the plaintiff's patent, or that plaintiff was the original and first inventor of anything embodied in defendant's machine.

On March 26, 1861, the parties went to trial on that issue. Testimony was taken on both sides, and, under the instructions of the court,* the jury returned their verdict in favor of the plaintiff in the sum of \$500.

Motion for new trial was filed by the defendant, who alleged the following reasons: first, because the verdict was against the law and the evidence; second, because the verdict was against the evidence and the weight of the evidence; third, because the jury neglected and refused to apply the instructions given them by the court, respecting the thing patented in the third claim of the patent declared on in the case, as well upon the question whether the plaintiff was the original and first inventor of the thing patented, as upon the question whether the defendant had infringed thereon; fourth, because the damages found by the jury were grossly excessive, and in plain contravention of the explicit instructions of the court to allow nominal damages. Another reason assigned was the refusal of the court to instruct the jury as requested by the defendant, but the view of the case taken by the court renders any explanation upon that subject unnecessary. Representations in writing, under oath, were subsequently made to the court by the defendant as a foundation for a further motion for new trial. First, that the plaintiff, during the progress of the trial, and before the verdict had been rendered, and while the court was not in session, and out of the presence and

* The charge of the court may be found in the Appendix.

hearing of the defendant and of his counsel, by himself and his agents, made communications to, and received communications from, jurors impanelled in the case touching the merits thereof; second, that the plaintiff, by himself and his agents, did unduly and unlawfully influence and bias the minds of the jurors impanelled to try the said cause, by acts, conduct, and declarations done and made with that unlawful intent, while the court was not in session, and out of the presence and hearing of the defendant and his counsel; third, that jurors impanelled to try the cause privately declared and made known to the plaintiff and his agents, that they had determined to render a verdict in favor of the plaintiff, and so declared and made known such determination, before the testimony on the part of the defendant had been all exhibited, and before the counsel for the defendant had been heard, and before the jury had received the instructions of the court, and before the case had been committed to them; fourth, that the trial was not by an impartial jury, such as the defendant had a constitutional and lawful right to have.

Leave was granted to the defendant to make proper proofs of the several representations, upon giving due notice to the plaintiff or his counsel, it appearing that all the matters set forth had come to the knowledge of the defendant and his counsel subsequent to the last adjournment of the court.

Accordingly testimony was taken, in open court, by both parties, October 17, 1861, and the same, by agreement, was duly reported for the consideration of the court.

Application for a patent was filed by the plaintiff March 31, 1853, but his original patent was not issued until the 7th of March in the following year. His charge against the defendant was that he had infringed the third claim of the reissued patent. This claim was as follows: "The feeding of the material to be sewn, by means of a vibrating piercing instrument, whether said instrument be the needle itself, or an independent instrument, in the immediate vicinity thereof, substantially as herein described."

To maintain the issue on his part, he introduced his reissued letters-patent, together with the model of the patented machine

furnished to the Patent Office. He also introduced the machine which he alleged the defendant sold, and which he claimed was a violation of the exclusive right secured to him, and upon the introduction of the machine the defendant admitted that he sold the machine, at the time and place alleged in the declaration, but denied that the machine infringed the third claim of the plaintiff, or that the plaintiff was the original and first inventor of anything embodied in that machine. Two questions, therefore, were presented: first, whether the plaintiff was the original and first inventor of anything embodied in the machine sold by the defendant; and second, whether the machine sold by the defendant, and given in evidence by the plaintiff, infringed the third claim of the plaintiff's reissued letters-patent. Defendant set up that the machine sold by him was constructed under certain patents granted to A. B. Wilson, or to his assigns, and that the invention of Wilson was prior to that of the plaintiff's, which was one of the important questions in the case. Wilson made the application for his first patent, on the 18th of March, 1850, and the patent was issued on the 12th of November, in the same year. His second application was on the 8th of July, 1851, and the second patent was issued on the 12th of August, in the following year. The patentee assigned his interest to Wheeler, Wilson, Warren, and Woodruff, before the date of the third application, which was made on the 7th of February, 1852, and the third patent was issued on the 15th of June, in the same year. Other patents subsequently issued to A. B. Wilson, or his assigns, were also admitted as showing that the three inventions already mentioned were still under the protection of subsisting patents, and had not become public property. Letters-patent to Grover and Baker, dated the 22d of June, 1852, together with the disclaimer accompanying the same, dated the 11th of December, 1854, were also admitted as showing that the claim of Wilson, to the four-motion feed, in his application of the 15th of June, 1852, was withdrawn by mistake as to the date of the invention.

Two of the patents, to wit, the first and third, were reissued, but it is unnecessary to describe the new patents, or to refer to

the assignments under which they were reissued, except to say that the machine introduced by the plaintiff as the machine sold by the defendant, was constructed under the patent reissued to W. P. H. Fitzgerald, dated December 19, 1854, and it was admitted that it was sold by the defendant, as the agent of the Wheeler and Wilson Manufacturing Company, to whom the patent had previously been assigned. It appeared from this that the machine of the defendant was constructed under an invention made and patented prior to the application of the plaintiff for his original patent. Unless, therefore, the plaintiff could show that his invention was actually made and reduced to practice at some time prior to the invention of A. B. Wilson, he could not prevail, because if the machine sold by the defendant was substantially the same as that described in the plaintiff's patent, then the plaintiff was not the original and first inventor of his supposed improvement; and if the two machines were not the same in principle and mode of operation, then there was no infringement. Full proof was exhibited that machines like that of the defendant, and not distinguishable from it in any respect, material in this investigation, were constructed and in the market for sale, before the time the plaintiff completed his model for the Patent Office, and several months before he applied for his original patent. In reply to this the plaintiff introduced evidence to show that the feeding apparatus described in his third claim was invented by him and reduced to practice as early as 1848.

This was denied by the defence. The testimony introduced to substantiate the representations made by the defence, that the plaintiff had made improper communications to jurors, and received such from them, was, in substance, this: that the plaintiff had learned from a person who conversed with some of the jurors, some weeks prior to the close of the trial, "that the verdict would not be for the defendant and could not be." Evidence as to other conversations with jurors was also introduced, the substance of which was that jurors had held conversations during the trial concerning the merits of the controversy, and had also expressed opinions thereon. Testimony to disprove that introduced under the representations of the defence was produced on the part of the plaintiff.

B. R. Curtis and *C. B. Potter*, for the defence and in behalf of the motion.

In a motion for new trial, the court is not called upon to pass upon any question of fact, for that in a court of law is the province of the jury, but it is simply to revise the evidence in the case, and to ascertain whether it is fit and proper that there should be another trial.

The authority vested in courts of law to order new trials was not intended to be a mere formal, barren, and inoperative power; it was intended, on the contrary, to supply a salutary guard against the mistakes, passions, prejudices, and ignorance of juries.

The judge was not designed to be a mere automaton to record the verdict of juries, but the law supposes that he will exercise an effective scrutinizing and controlling judgment; nor does the fact that there has been evidence submitted to the jury on both sides of the point at issue effect the exercise of this beneficial power of supervision. 3 *Graham on New Trials*, 1240.

If the court is convinced that the weight of the evidence is against the verdict of the jury, it is its duty to grant a new trial.

In a case where the time occupied in the trial, and the mass of evidence put into the case, are such that the jury can probably retain it in their minds, in order to weigh it, the court will be less ready to suppose that the jury have fallen into a mistake; but in a case like this, where the issues are numerous, where they are complicated of law and fact, where they are subtle, complex, and difficult of apprehension, where the length of the trial is very great, where the jury learn nothing of the law of the case until the last stage, i. e. the instructions of the court,—in a case of this character, trial by jury is liable to many mistakes. If parties choose to adopt this mode of trial, in such a case they must take it with its infirmities.

The burden of proof was upon the plaintiff to show by competent and sufficient evidence that the old red machine was a practical and working sewing-machine, and that in it and by it the plaintiff reduced to practice the same method of feeding patented

in the third claim ; and if he failed to do this, the verdict should have been for the defendant.

It was not enough that he did something in 1848, or that the old red machine amounted to something ; it must have been a reduction to practice of the same method of feeding that is found in the patent.

It was not enough that that method of feeding was merely experimental, to test the operation of other parts of the machine, and then laid aside and never resumed.

The verdict of the jury was against the instructions of the court. Under the instructions of the court the jury ought to have found that the plaintiff so conducted in regard to this invention that his patent was not valid against Mr. Wilson.

The verdict affords sufficient evidence that the jury which tried this case were either culpably inattentive to the instructions of the court, or regardless of them. It is unnecessary for the defence to show to a demonstration either of these things. *Commonwealth v. Roby*, 12 Pick. 496.

Where there can be no certainty that the verdict has not been improperly influenced, the mode of correction is by undoing what is thus improperly and may have been corruptly done. The intention of the court is to protect its own proceedings ; and if the court cannot see that it would be safe to assume that the verdict has proceeded upon right principles, it is its duty to set it aside. The jury were instructed to award nominal damages, and they awarded \$500.

As against the defendant the plaintiff was only able to show the sale of one machine, and the court instructed the jury that the plaintiff could recover damages for the sale of one machine only.

Improper communications to and from jurors, and improper conduct upon their part, are shown by the evidence.

W. Whiting and *A. C. Washburn*, for the plaintiff and against the motion.

As to damages : if by the evidence the amount of damages was left undeterminate, the jury were authorized to draw fair and proper inferences. The *ad damnum* was \$10,000 ; no par-

ticular sum as damages was agreed to by the counsel, or suggested by the court. This omission should not be allowed to prejudice the plaintiff, since he offers to remit so much as the court shall deem excessive.

A verdict will not be set aside and a new trial granted if the prevailing party offers to remit the excess of damages. 3 Graham on New Trials, 1162, and cases there cited; *Leson v. Smith*, 4 M. & W. 304; *King v. Howard*, 1 Cush. 137; *Dibden v. Murphy*, 3 Sand.; *Howard v. Grover*, 28 Me. 97; *Newell v. Gage*, 24 Me. 47; *N. J. Flax Co. v. Mills*, 2 Dutch. 60.

Wrong motives will not be imputed to a jury, if there is not proof other than that arising from the proposition. 3 Graham on New Trials, 1164, 1362, 1863; *Bulwer v. Tyringham*, 12 Pick. 547; *Reed v. Davis*, 4 Pick. 216; *Clark v. Binney*, 2 Pick. 113.

The verdict of the jury does not show that they neglected to apply the instructions of the court. As to granting new trials, *Wood v. Gunston*, Sty. R. 466; 1 Graham on New Trials, 3-7; 3 Graham on New Trials, 1213, 1238.

Where the evidence is conflicting, the verdict will not in general be disturbed. 3 Graham on New Trials, 1261, 1267, 1275, 1283; 27 Barb. 527; *Milo v. Gardner*, 41 Me. 549; *Lindsay v. Wayland*, 17 Ark. 385; *Abernethy v. Branch State Bank*, 5 Ohio, 266; *People v. Goodrich*, 3 Parker, C. R., N. S. 518; *Gibson v. State*, 9 Ind. 264; *Hall v. Henline*, 9 Ind. 256; *Roberts v. Nodrift*, 8 Ind. 839.

Upon the question whether the change in the mode of holding so far modified the feeding apparatus as to make it essentially different in the machines compared, there was a great body of conflicting testimony, and as a question of fact it was left to the jury. The plaintiff reduced his invention to practice in 1848, and did not abandon it.

The proof of improper conduct in the jury, if any exists, comes from a single witness.

There is nothing improper in the communication concerning what the jury thought.

Witnesses, in narrating conversations, are apt, by the change of only a single word, to alter very materially the sense and mean

ing of what was imparted to them in such conversations. Such testimony is received with caution.

A verdict must be presumed to have been honestly and fairly rendered till the contrary is shown. 3 Graham on New Trials, 1362.

CLIFFORD, J. Beyond question the patent was *prima facie* evidence that the plaintiff is the original and first inventor of what he has described therein as his invention, and when taken in connection with his original application is *prima facie* evidence that the invention was made at the time the application was filed. Presumptions were in favor of the plaintiff to that extent; but when he proposed to show that his invention was of a date prior to his original application, he took the burden upon himself, and to maintain that theory it was incumbent upon him to prove, by competent and sufficient evidence, that he made the invention at the period suggested, and that he reduced the same to practice in the form of an operative machine; and if he failed to prove either of the elements of the proposition, then the verdict should have been for the defendant. Judge Story said, in *Bradford v. Hunt et al.*, 1 Mas. 305, that "the intent of the statute was to guard against defeating patents by the setting up of a prior invention which had never been reduced to practice. If it were the mere speculation of a philosopher or mechanic, which had never been tried by the test of experience, and never put in actual operation by him, the law would not deprive a subsequent inventor, who had employed his labor and his talents in putting it into practice, of the reward due to his ingenuity and enterprise." Language equally explicit is employed by Mr. Justice Nelson, in the case of *Parkhurst v. Kinsman*, 1 Blatch. 494, wherein he says: "It is not enough to defeat a patent already issued, that another conceived the possibility of effecting what the patentee accomplished. To constitute a prior invention, the party alleged to have produced it must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form." "It must," says the learned judge, "have been carried into practical operation; for he is entitled to a patent, who, being an original inventor, has first perfected the invention and

adapted it to practical use. Crude and imperfect experiments, equivocal in their results, and then given up for years, cannot be permitted to prevail against an original inventor, who has perfected his improvement and obtained his patent." Plaintiff claimed at the trial that the feeding apparatus described by him in the third claim of his patent was invented by him and reduced to practice in the form of an operative machine as early as the 27th of October, 1848, and that the same feeding apparatus was embodied in his original letters-patent. Every branch of the proposition was controverted by the defendant. He denied that the plaintiff invented any such feeding apparatus at so early a period, or at any time prior to the date of the application for his original patent, or that he ever reduced the same to practice in the form of an operative machine, or that the feeding apparatus which he alleges he invented and reduced to practice at that period of time is now embodied in the third claim of his reissued letters-patent. Reference to the third claim of the patent will show what the feeding apparatus is in the reissued letters-patent on which the suit is brought, and it may be well to refer briefly to the instructions given by the court to the jury upon that subject, before stating the evidence introduced by the plaintiff to prove that he invented the apparatus and reduced it to practice, before the application for his original patent. Such brief portions only of the instructions will be referred to as appear to be material to the point under consideration. After reciting the claim the jury were instructed that the third claim of the plaintiff's patent was for his described means of feeding the cloth or other material to be sewed in a sewing-machine. Feeding the cloth or material was defined as signifying such a regular, progressive advance of the material, as would space the stitches of the seam regularly, so that the stitches would be of equal length. Responsive to the argument of the plaintiff, that the feeding instrument was distinct from the devices for holding the cloth or material to be sewed, the jury were told that there was included in the claim, as part of his mode of operation, not only the vibrating, piercing instrument, substantially as described, but also whatever parts necessarily act in connection therewith, to

feed the material to be sewed in a sewing-machine, so far as any function they performed modified the action of the feeding instrument. As explanatory of that instruction, the jury were told that there must be a table, or some equivalent mechanical device to keep the cloth in position, so that it would resist the thrust of the piercing instrument while it was making the perforation, after the pressure of the holder upon it was relieved to permit the needle as it vibrated, to move forward the cloth a sufficient distance for the succeeding perforation. In this connection, the jury were also told that the vertical bar, or holder, when held down upon the cloth by the spring, was quite necessary to the proper operation of the feeding arrangement, and were accordingly instructed to the effect, that the surface below the material called the table, which supported the cloth when it was pressed by the vertical bar, or holder, so as to keep the cloth from slipping as the needle descended and perforated it, and also the cloth holder, which exerted its pressure for that purpose, were included in the claim, as necessary to the plaintiff's mode of operation in feeding the material to be sewn, so far as the functions performed by those devices modified the action of the feeding instrument. To show that he invented this feeding apparatus and reduced it to practice within the meaning of those terms, the plaintiff introduced the "old red machine," as it was called throughout the trial. Parties are competent witnesses by the local law, and accordingly the plaintiff was very fully examined upon this subject. According to the testimony of the plaintiff, his first step towards constructing a sewing-machine was taken in July, 1848, when he made certain patterns for needle bars, and he states that needle bars were subsequently made from the patterns by his directions. He arranged them in a temporary frame and got some gearings made, but they proved not to be of a character to answer any purpose, except as a basis of calculation for another set of patterns, and he states that he did not attempt to sew with the machine. Having made his calculations he constructed a new set of patterns and sketches, and employed a mechanic to make another set of needle-holders and apparatus for a machine. They were made in August, 1848, and after they

were completed, the plaintiff took them, together with the shafting and gearing which he had provided, to a cabinet-maker, and employed him to make the frame. That machine had the straight clamp, or what was called the "wooden holder," during the trial, and the witness states that he did sewing enough with the machine to satisfy himself that it "was going to be a good practical thing." Intending to reconstruct the machine more thoroughly, with a view to apply for a patent, he took the needle-holders out of the frame and carried them back to the machinist, in order to have another set made with certain additions and alterations. After the needle-holders were completed, and the shafting and gearing had been somewhat improved, he then had a new frame made for the machine, and put the whole in working order, using for that purpose the third set of needle-holders. About the same time he also had a ratchet clamp made; but as it was not fully completed, and the arrangement to receive it was not finished, except on one side of the machine, it could not be used. Castings were also made by the plaintiff for a rotary clamp-holder, but they proved to be too heavy, and were never finished; so that the only device ever used by him, before he went to Washington with the machine, was a straight clamp, or wooden holder, like the one produced at the trial, but that was not carried to Washington, and the identical device was not produced at the trial.

On cross-examination the witness testified in substance and effect that he used the straight clamp to try the machine and see what the effect would be as a feeder, and that he afterwards arranged the wheel or circular clamp to make the machine automatic; and that the other was given up, adding, in the same connection, that he did not consider that the straight clamp was very curious or patentable. Short pieces of canvas and padding were sewed by the plaintiff in the machine before he went to Washington, and he states that he used the straight clamp or wooden holder for that purpose, and that he sometimes sewed the length of the piece, and then around the edge, and back again in various forms. He started for Washington on the 27th of October, 1848, having completed the machine a few days be-

fore, taking with him the patterns for the rotary clamp, but leaving behind the castings and the wooden holder. After his arrival in Washington he employed a patent solicitor, and soon learned that some parts of his invention had been anticipated by others, and that his model was too large, and would not be received at the Patent Office, on account of its size. Forwarded, as his machine was, by the merchandise train, he arrived in Washington several days before the machine came to hand, and during that period he constructed a rotary clamp, which was made of mahogany. Injury had been done to the machine on the route, but he repaired it and fitted in the rotary clamp, for the first time. Up to that period of time he had never used any other than the straight clamp or wooden holder, and, in point of fact, could not do so, because he had not constructed any rotary clamp, and one of the necessary arrangements for the ratchet clamp had not been completed. Having fitted in the rotary clamp, he says he operated the machine in the presence of his patent solicitor, but he does not state that he used it to sew seams. When he found he could not patent the machine, he decided, under the advice of his solicitor, to file a caveat, and his solicitor also prepared another paper, in the nature of a petition for a patent, but it was never presented at the Patent Office. His patent solicitor prepared the caveat, and it was duly executed and filed on the 7th of November, 1848, and was accompanied with a drawing to illustrate the invention. Nothing further was done by him towards procuring a patent. On the contrary, having executed those papers, and filed the caveat, he took the machine out of the frame, leaving the frame there, put the parts of the machine into a trunk, which he purchased for the purpose, and on the same afternoon left Washington to return to his home. All those parts of the machine remained in the trunk, in his house at New Hartford, until he removed to Granville, when he put them into a box, and, with the exception of some few parts, which he afterwards used in other machines, they remained in the box until the first part of January, 1853. During the period, from the 7th of November, 1848, when he left Washington, to the last of December, 1852, or the first part of January, 1853, he did nothing to perfect or

construct any needle-feed apparatus for feeding the material to be sewn in a sewing-machine. Taking his own statement as true, he commenced soon after he returned from Washington to make the preparatory investigation to accomplish what is called the Grover and Baker stitch, and in the course of that month or the month following he made a model. While he was at work on the model, and within eight or ten days after he returned, he wrote to his patent solicitor respecting the same, stating, among other things, that "the needles cross each other and catch the thread from each needle, in the same manner as they do when both pass through the cloth, the object being to have all the looping on one side, and on the other side leave but one thread, the same as in common back stitching by hand." In the same letter he also stated that "the only disadvantage (if it may be called a disadvantage) in this arrangement of the needles will be in the necessity of moving the wheel on which the work is placed by means of a feeder, as I had designed to move the bar, which is very easily done." Some time in January following he sent a rough model of that machine to his patent solicitor, and it remained in his possession till October or November, 1852. Little or nothing was done by him after that towards constructing any model or machine, except to make some patterns, till June or July, 1852, when he went to Springfield, and had some gearings, castings, and shafting made for a sewing-machine, and shortly afterwards went to Granville and employed a mechanic to help him make the machine. Both parties conceded that these were models of what is called the Grover and Baker stitch, with a rotary clamp; and the witness stated that he completed the invention in September, 1852, and carried the model to Washington and filed an application in the Patent Office, with a view to patent the invention. But a patent had been issued to Grover and Baker for the same stitch, on the 11th of February, 1851, and they had an application pending, or one was shortly afterwards presented for a reissue of the patent. Upon the presentation of the application an interference was declared by the Patent Office, and notice was given to the applicants. Whereupon they sent their agent to adjust the controversy with the plaintiff.

They first met at Hartford, and there the plaintiff saw and examined the Grover and Baker machine. Two or three other interviews were had, and an arrangement was made whereby the plaintiff assigned to the agent of the other parties all his interest and claim in the stitch, and perhaps in the needles. Under the arrangement the patent for the stitch, &c. was to issue in the name of Mr. Bates, and it was accordingly granted to him on the 22d of February, 1853, and on the 12th of April following a patent issued to the plaintiff for the rotary clamp. None of these transactions had any relation to any apparatus for feeding the material to be sewn in a sewing-machine, and they are of but little importance in the case, except as showing the nature of the plaintiff's employment, and that he had an opportunity to examine the Grover and Baker machine. Drawings for a needle-feed were commenced by the plaintiff about the 3d of January, 1853, and in the spring of that year he had the frame of the old red machine constructed, as it was exhibited at the trial. Some changes, however, were made in the parts of the machinery, as, for example, the cams are not the same, and other needles have been supplied. Most of the parts, as the plaintiff states, are the ones that he brought back from Washington, but the crank and one pulley he had used in getting up one of the other models, and the rotary clamp and the fly-wheel are also new. His application for a patent was filed on the 31st of March, 1853, and on the 7th of March, of the following year, the original patent was issued. To account for the delay, from the 7th of November, 1848, when he left Washington, until the 3d of January, 1853, when he commenced to restore the machine, he introduced testimony tending to show that during a part or all of that time he was in poor health, and that he was somewhat embarrassed in his circumstances. On the other hand, the defendant introduced testimony tending to show that his general health was not seriously impaired, and that his pecuniary circumstances were such that he was able to purchase a farm worth some \$1,500, and that he had about the usual amount of stock on the farm. Nothing need be said respecting the caveat, as the statement of the case already exhibited shows that it expired without anything being done to restore the machine. On

this state of the case the jury were instructed that if the plaintiff did not make any such invention as is described in the third claim of his reissued letters-patent in 1848, or if he did, and he did not reduce the same to practice, in the form of an operative sewing-machine, then they were not authorized to find that his patented invention takes date prior to the time when he filed his application for his original patent. Two other instructions, applicable to this state of the case, were also given by the court, which it becomes important to notice. Of these the first was, that if the jury find that the plaintiff invented the needle-feed, which is in the old red machine, in 1848, embodying the same in a machine, of which the old red is a true representation (excluding the rotary clamp), and operated it with the stationary holder, as he has described in his testimony, and carried it to Washington, leaving the stationary holder at home, and there constructed, and fitted in the rotary clamp, and operated it there, as he has stated in his testimony, and on the 7th of November, 1848, filed his caveat in the Patent Office, still, if they also find that the plaintiff, on the same day that he filed the caveat, took the machinery out of the frame in Washington, and brought the parts home, leaving the frame there, and laid them aside as something incomplete, and requiring more thought and experiment, before he restored the invention in the form of an operative machine, although not with a definite intention of abandoning what he had accomplished, yet not with any determinate intention of resuming the same, but really for the purpose of preserving the parts, to be used by him, or not, as he might thereafter determine, and suffered his caveat to expire, and did nothing to restore the invention in the form of an operative machine, or to mature the needle-feed, from the time he left Washington to the last of December, 1852, when he commenced to make a model with a view to apply for a patent, and in the mean time A. B. Wilson, without knowledge of what the plaintiff had accomplished, invented the same thing, and reduced the same to practice, in the form of an operative machine, filed his application for a patent after the plaintiff's caveat had expired, and then obtained letters-patent for the same, and that A. B. Wilson, or his assign, manu-

factured machines under that patent, for practical use as sewing-machines, containing the same feed, and that the machines so manufactured were sold in the market, and went into practical use before the plaintiff commenced to restore his invention, or to make his model, with a view of obtaining his original patent, then the jury are instructed that if the defendant's machine was made under the Wilson patent, and the defendant sold the same by the authority of Wilson or his assigns, the plaintiff cannot carry back his invention to any period prior to the time he commenced to make the model for his original patent, provided the jury also find that the Wilson patent embodies the same needle-feed as that of the plaintiff's patented invention. Secondly, they were also instructed that if they found that the plaintiff, after having taken the machinery out of the frame, in Washington, and brought it home, leaving the frame there, laid the machinery aside as something incomplete, and requiring more thought and experiment, and never intending to reconstruct the machine, or to restore the needle-feed in the form of an operative sewing-machine, without material modifications or alterations, but only to preserve the parts to be used in other inventions as circumstances might arise, then the jury were instructed that they would be fully warranted in finding that he deserted and abandoned the invention so far as respects the needle-feed, provided they also found that he did nothing to restore the needle-feed in the form of an operative machine, from the 7th of November, 1848, to the last of December, 1852, or the 1st of January, 1853.

Extended argument upon the several propositions, arising out of the proper application of these instructions to the evidence in the case, will not be attempted; as I am of the opinion that the jury erred in respect to them all; that if they had properly applied any one of them to the evidence, their verdict must have been for the defendant. They were told, in addition to the first instruction referred to, that it was necessary for them to inquire and determine what, if anything, the plaintiff invented and reduced to practice in the form of an operative sewing-machine, so far as respected the feeding apparatus, prior to his application for his original patent, and if anything, whether the same or a

substantial and material part of the same was embodied in the reissued letters-patent, as construed and defined by the court. As already appears, the court had construed the third claim of the reissued letters-patent, and instructed the jury that there was included in it, not only the vibrating piercing instrument, substantially as described, but also whatever other parts necessarily acted in connection therewith, to feed the material to be sewed in a sewing-machine, so far as the functions performed by such other parts modified the action of the feeding instrument. Applying those instructions to the evidence, it is obvious that the jury must have found as follows: first, that the plaintiff invented and reduced to practice in 1848 an operative sewing-machine, which contained embodied therein a needle-feed, which is the same or substantially the same as that described in the third claim of his reissued letters-patent; second, that the old red machine, made in 1848, was an operative sewing-machine, and that it contained the needle-feed described in the third claim of the plaintiff's reissued patent as construed and defined by the court, including the pressure-foot and table, or equivalent devices; third, they must have found that the plaintiff, on his return from Washington, did not lay aside the parts of the machine brought home as something incomplete, and requiring more thought and experiment, before he attempted to restore the invention in the form of an operative machine, as that element of the instruction, in the main aspect of the case, was the only one that properly admitted of any dispute; fourth, they must have found that the plaintiff did not desert and abandon the invention, so far as respects the needle-feed, and consequently that, after having taken the machinery out of the frame and brought the parts home, leaving the frame in Washington, he did not lay the machinery aside as something incomplete, and requiring more thought and experiment, but that he laid it aside without any intention of abandoning the same, and with the intention of constructing a new frame, and of restoring the invention, including the needle-feed, in the form of an operative machine. Giving full effect to all the testimony of the plaintiff, it does not show, and in the judgment of the court does not tend to show, that he

invented in 1848, and reduced to practice in the form of an operative machine, any needle-feed which included a pressure-foot and table, or any equivalent devices, and unless the needle-feed included those devices, the jury were not authorized under the instructions of the court, to find a verdict in favor of the plaintiff. His own testimony shows indubitably, that the straight clamp or wooden holder was a mere experiment, and as such was left at home when he went to Washington, with a view to apply for a patent; and in point of fact the clamp was never restored until near the close of the first trial to the jury. Argument upon that subject is unnecessary, as the testimony of the plaintiff upon the point is full and explicit. He never completed the ratchet clamp, and it will hardly be pretended that the rotary clamp is, or can be to any practical extent, an equivalent for the pressure-foot and table, to be found in the patented invention. Unfinished and incomplete as the machine was, it is impossible to hold, on the evidence exhibited, that it was reduced to practice in the form of an operative machine, without departing from the well-settled rules of law, uniformly recognized and approved in all the courts of the United States. *Gayler v. Wilder et al.*, 10 How. 496; *Root v. Cutler*, 1 Story, 590; Cur. on Pat. § 43; *Woodcock v. Parker et al.*, 1 Gall. R. 438; *Washburn v. Gould*, 3 Story, 121.

Further explanations are not necessary to show that the verdict could not have been for the plaintiff, unless the jury found that the old red machine was an operative sewing-machine, and that it included the equivalents of the pressure-foot and table, so far as those devices in the patented machine modified the action of the feeding instrument. Evidently the finding of the jury on that point is against the evidence as already explained, or it is entirely opposed to the charge of the court.

Taking the uncontradicted testimony of the plaintiff as true, he did nothing during the period, from the 7th of November, 1848, to the last of December, 1852, or the first part of January, 1853, to construct or perfect any needle-feed apparatus, for feeding the material to be sewn in a sewing-machine. Evidence explanatory of the delay was wholly wanting at the time, except

that offered as to the health of the plaintiff and his pecuniary condition, and the evidence on that point was conflicting, and the plaintiff's own testimony showed that he was able and found the means to work at other inventions within that period. Considering all the circumstances, and giving them all due weight, still the inference was a clear one, that the plaintiff, on his return from Washington, had laid aside the materials as something incomplete, and which required more thought and experiment, before he attempted to restore the invention. Regarding the inference to that effect as a clear one, and wholly unopposed by other evidence of any importance, I am of the opinion that the verdict, in this view of the case, was clearly against the evidence. *Walker et al. v. Greely*, 1 Cur. 63.

When the plaintiff returned from Washington, he laid the parts of the machine brought home aside, as before explained, and never attempted to restore the invention, until an opportunity was afforded him to examine the Grover and Baker machine.

Prior to that time, there is not, in the view of the court, a circumstance in the case that does not appear to indicate that he had utterly deserted and abandoned the old red machine. He had devoted all of his time and attention to the construction of models for other inventions; and as circumstances had rendered it convenient and useful, he had appropriated a certain portion of those materials to other machines. Except the fact that he did ultimately reproduce the machine, or a representation of it, there does not appear to be the slightest evidence to warrant the conclusion that, when he laid the materials aside, he had any expectations whatever that he would ever attempt to restore the invention. For these reasons, I am of the opinion that the finding of the jury on this point was undeniably against the weight of the evidence.

Nominal damages only were claimed by the plaintiff in the opening of his case, and the evidence showed that the defendant sold but one machine, and that was admitted by the defendant at an early stage of the trial. When the subject of damages was alluded to, in the closing argument, it was again stated that the plaintiff only claimed nominal damages. Such damages only

being claimed, and there being no sufficient evidence to show that more than one machine was sold, the court instructed the jury, if their verdict was in favor of the plaintiff, to find nominal damages; but they returned a verdict in his favor, assessing damages in the sum of \$500. Errors of this description may sometimes be obviated by allowing the prevailing party to remit the excess, and that course is frequently adopted in cases where the court is satisfied that the error has resulted from oversight or mere inadvertence; but where, as in this case, the finding is not only contrary to the evidence, but in direct contravention of the charge of the court, the difficulty cannot in general be remedied in that way. Parties have a right to an impartial trial according to law; and where it appears to the court that the requirement of the law in that behalf has not been fulfilled, it is the duty of the court, on motion to that effect, to set the verdict aside and grant a new trial.

Misconduct of the party and of the jury is also alleged, but having already reached the conclusion, upon grounds connected with the merits of the controversy, that a new trial must be granted, it is not deemed necessary to reproduce the evidence offered by the defendant in support of the motion. Irregularity on the part of the party charged, or of the jury, must be satisfactorily proved, in order to lay the foundation for the interposition of the court; but when the irregular conduct is established, it is not necessary that it should certainly appear that it influenced the jury. In that state of the case, it is sufficient that the irregularity appears to be of a character that it might have affected the impartiality of the proceedings. Such was the rule laid down in *Commonwealth v. Toby*, 12 Pick. 520, and it appears to be correct. In that case the court says, that "where there is an irregularity which may affect the impartiality of the proceedings, as where meat and drink or other refreshment have been furnished by a party, or where the jury have been exposed to the effect of such influence, as where they have improperly separated themselves, or have had communications not authorized, there, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of cor-

rection or relief is by undoing what is thus improperly and may have been corruptly done. Text-writers usually state the rule as follows: "That whenever it is made satisfactorily to appear that the jury were influenced by improper motives, or that they acted corruptly or under a mistake, or it clearly appears that a fair trial has not been had, the verdict will be set aside and a new trial granted." Any improper interference with the jurors may afford sufficient ground for granting such a motion, and it is not necessary that the attempt to influence the jurors should be made by one of the parties, nor even by his agent. It is sufficient, if it clearly appear that it was done in his behalf; and it is never necessary to show that the misconduct controlled or determined the verdict, provided it was of a character that it might have had an undue influence. Taken as a whole, the evidence shows very unusual, and, in the opinion of the court, culpable conduct, on the part of Thomas J. Herring, which cannot but be regarded as an irregularity, and which in point of fact affords strong grounds to conclude, that he must have learned from some one of the jury, the result of their deliberations, before that result was announced in court. Strong ground to conclude, that the plaintiff knew what the result would be, several days before the verdict was rendered, is also furnished by the testimony taken in the motion.

Those facts and circumstances must be weighed in connection with the conduct of the jury, in disregarding the instructions of the court in respect to the merits of the controversy; and when viewed in that connection, they produce full conviction in the mind of the court, that the parties have not had an impartial trial according to law. The courts of the United States have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of common law; and where, as in this case, it is fully made to appear that the trial has not been an impartial one, it is the duty of the court to exercise the power conferred by the Judiciary Act. Verdict set aside and new trial granted.

JOSEPH HUDSON, Libellant, v. THOMAS BRADLEY *et al.*, Appellants.

Where a party in Massachusetts, bound to the payment of a simple contract debt, gives his own promissory note for the debt, the presumption, in the absence of any proof to the contrary, is, that such note was accepted by the creditor in satisfaction and discharge of the pre-existing debt.

Such presumption is, however, one of fact only, and may be rebutted and controlled by any evidence showing that such was not the intention of the parties.

If it appear that the note was not the obligation of all the parties who were liable for the original debt, and *a fortiori*, where it appears that the note was that of a third party, and if held to be in satisfaction, would wholly discharge the party previously liable, then the presumption, if it exist at all, may be repelled by slight circumstances evidencing a contrary intention.

ADMIRALTY appeal. The libellant, a sail maker, furnished to the bark *America* materials and labor in making and repairing her sails, and payment being refused, he instituted this suit against the owners of the vessel, to recover his bill for the materials and labor furnished. It was alleged in the libel that he furnished the materials, and rendered the services during the year 1859; that he had repeatedly requested payment for the same, which had been refused. The respondents in their answer admitted that the vessel, while lying in the port of Mattapoisett, was in need of such repairs, and that their agent contracted with the libellant to furnish such labor and materials; but they denied that any demand of payment was ever made of them. They further alleged that the libellant received of their agent certain promissory notes, and accepted the same in payment of his account to the extent of the notes so received, and two receipts were appended to the answer as proof of the fact so alleged. Of these, the first was dated January 24, 1860, and acknowledged the receipt of two notes, "for and on account of vessel's bills." Those notes were signed by the agent who contracted for the repairs, and were each for \$1,000. One was dated January 21, 1860, and was payable in six months; the other January 24, 1860, and payable in four months. The second receipt was dated April 30, 1860; was for a note of the agent of the same date with the receipt, for \$1,000 on account, and was payable in six

months from date. By a supplemental answer the respondents also alleged, that they had adjusted and paid to their agent all the outfit bills of the vessel, including the claim of the libellant, and they averred that they ought not to be required again to pay the same. It was agreed, that the account annexed to the libel was correct, and that the receipts annexed to the answer were executed by the libellant, so that the question was, whether the notes specified in the receipts were accepted as payment to that amount. It was also agreed, that the note mentioned in the second receipt was never paid, and the case showed that it had been duly tendered back to be cancelled.

The agreed statement also showed, that half the amount of the notes described in the first receipt was paid by the agent who gave the same, at maturity, and that two other notes, each for the sum of \$500, were given by him as an extension of the time of payment. One of the renewed notes was dated May 26, 1860, and the other July 23, in the same year, and each was payable to the order of the libellant, in four months from date.

Neither of the notes was ever paid, and both were, at the hearing, tendered back to be cancelled. The first-mentioned notes were indorsed by the libellant, were discounted at bank, and it appeared that he used the proceeds in his business. The renewed notes were also indorsed by him; and being liable therefor, as indorser, he was ultimately obliged to pay them, after protest. He also indorsed and negotiated the note, described in the second receipt, but this he was also obliged to pay his indorsee, at maturity, it being protested for non-payment. No demand of payment of the claim, prior to January 1, 1862, was made of the respondents, otherwise than of their agent, who made the contract for the repairs; and the case showed that on July 28, 1860, the agent died insolvent. In the court below a decree was entered in favor of the libellant.

T. D. Eliot and *T. M. Stetson*, proctors for libellants.

The respondents say, that their agent gave the plaintiff certain promissory notes, which they claim were a payment, though the notes have not been paid and are now offered back by libellant.

That is to say, libellant must lose his property and labor, which

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went to the respondents' use and benefit, and enabled them to send their vessel on a profitable enterprise.

The respondents must prove that the notes were given and received as payment; to do this, they claim that the notes by law constituted payment. This is not pretended to be the case anywhere but in Massachusetts and Maine. *Page v. Hubbard*, 1 Sprague, 336; *The Chusan*, 2 Story, 469; *Fowler v. Bush*, 21 Pick. 230; *Cushing v. Wyman*, 38 Me. 589.

Elsewhere the note is only conditional payment; i. e. payment if the note is paid. *Arnold v. Delano*, 4 Cush. 39.

In Maine and Massachusetts the decisions are not rules of law, but only presumptions of fact.

The *lex loci* usually governs, as to the nature, validity, and construction of a contract, but the *lex fori* as to the remedy. *Reimsdyk v. Kane*, 1 Gall. 371.

It is the old distinction between "facts" and ascertainment of facts, rights, and remedies. 2 Parsons on Con. 100-104; *Andrews v. Heriot*, 4 Cow. 508; *Bank of United States v. Donally*, 8 Pet. 361.

Besides, it has been held by the Supreme Court, that in "commercial questions, the general law governs, and not the local, in the admiralty courts of the United States." *Swift v. Tyson*, 16 Pet. 1; *Mutual Safety Co. v. Cargo Brig George*, Olcott, 101.

It is distinctly held, both in Massachusetts and Maine, that the note is not a payment and that the presumption is repelled, where there are copromissors or security to the original claim, because it would be absurd to presume that a person would release them, especially so, in a case like this, where a mechanic is presumed to rely upon the usual securities of a material-man. *Melledge v. Boston Iron Co.*, 5 Cush. 170; *Fowler v. Ludwig*, 34 Me. 461; *Page v. Hubbard*, 1 Sprague, 335; *Curtis v. Hubbard*, 9 Met. 328; *Arnold v. Delano*, 4 Cush. 41; *Thurston v. Blanchard*, 22 Pick. 21; *Butts v. Dean*, 2 Met. 76; 1 Parsons' Mar. Law, 93; 2 Parsons on Con. 136; *Palmer v. Priest*, 1 Sprague, 513; *Baker v. Draper*, 1 Cliff. 420.

If there has been any wrong or misapprehension, the presump-

tion of payment arising from giving a note is repelled. See *Thurston v. Blanchard*, 22 Pick. 18.

It makes no difference that the libellant indorsed and negotiated the notes, since he had to pay them at last, and he now offers them back. *The Chusan*, 2 Story, 457; *Melledge v. Boston Iron Co.*, 5 Cush. 172; *The Harriet*, Sprague, 33; *Drake v. Mitchell*, 3 East, 251; Byles on Bills, 435, c. 29; *Sweet et al. v. James*, 2 R. I. 270; *Steamboat Fashion*, 1 Newb. Adm. 55; *Kimball v. Ship Anna Kimball*, (*ante*, p. 4.)

Slight evidence is sufficient to rebut the presumption, that notes were given and received as payment.

The delay of the libellant in making demand on the owners, was no evidence that the notes were taken as payment; it rather showed that he thought his demand was admitted.

R. C. Pitman and *C. T. Bonney*, proctors for respondents and appellants.

The contract in question was made in Massachusetts by citizens of that State, and so the law of Massachusetts must control the case. *Baker v. Draper*, 1 Cliff. 420; *The Chusan*, 2 Story, 467; *Palmer v. Priest*, 1 Sprague, 512.

By express decisions of her courts, the receipt of a negotiable promissory note is, in Massachusetts, *prima facie* payment of a pre-existing debt. *Thacher v. Dinsmore*, 5 Mass. 300; *Maneely v. M^r Gee*, 6 Mass. 143; *Johnson v. Johnson*, 11 Mass. 361; *Whitcomb v. Williams*, 4 Pick. 230; *Reed v. Upton*, 10 Pick. 522; *Jones v. Kennedy*, 11 Pick. 130; *Wood v. Bodwell*, 12 Pick. 268; *Butts v. Dean*, 2 Met. 76; *Ilseley v. Jewett*, 2 Met. 173; *Rindge v. Breck*, 10 Cush. 44; *Parker v. Osgood*, 4 Gray, 456; *Derrickson v. Whitney*, 6 Gray, 250; *Newall v. Hussey*, 18 Me. 250; *Dickinson v. King*, 28 Vt. 380; *Collamer v. Langdon*, 29 Vt. 32.

The presumption exists, although some of the parties liable, or some security is released. *Fowler v. Bush*, 21 Pick. 230; *Rindge v. Breck*, 10 Cush. 44.

And so it has been expressly decided, that taking the note of one of the owners releases the others. *Chapman v. Durant*, 10 Mass. 47; *French v. Price*, 24 Pick. 13, 20; *Paige v. Stone*, 10

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Met. 160 ; *Stephens v. Thompson et al.* 28 Vt. 77 ; *The Brig Nestor*, 1 Sumn. 87.

The renewal notes were payment of the prior note. *Cornwall v. Gould*, 4 Pick. 444 ; 1 Smith's Lead. Cas. (5th ed.) 458 ; *Castleman v. Holmes*, 4 J. J. Marsh. 1 ; *Slaymaker v. Gundacker*, 10 S. & R. 75.

There is nothing in proof to rebut the legal presumption of payment.

But the legal presumption is strengthened by several circumstances in proof.

The libellant was a citizen of this State, and there is a presumption of fact as well as law, that he knew the long-established Massachusetts doctrine.

The libellant negotiated both notes.

The delay in making claim on the other owners is plenary evidence of the libellant's understanding.

Libellant by his laches is estopped from denying that he gave exclusive credit to the agent. The other owners settled with the agent upon this understanding. *Macy et al. v. De Wolf*, 3 W. & M. 193 ; *James v. Bizby*, 11 Mass. 34, 41 ; *Tudor v. Whiting*, 12 Mass. 212 ; *Reed v. White*, 5 Esp. 122 ; *Evans v. Drummond*, 4 Esp. 89 ; *Wyatt v. Hertford*, 3 East, 147 ; *Keymer v. Suwercropp*, 1 Campb. 109 ; *Thompson v. Percival*, 5 B. & A. 925 ; *Palmer v. Priest*, 1 Sprague, 513 ; 1 Parsons' Mar. Law, 99 ; Story on Agency, §§ 249, 439 ; Abb. on Shipp. 136, note.

If he had called on us while the agent lived, we might have had reimbursement. Now his estate is insolvent.

Libellant, for his own interest probably, chose to indulge the agent for years. He, and not we, should suffer.

CLIFFORD, J. Evidently the question of payment is the only one of any importance in the case.

Where a party in this State, who is bound to the payment of a simple contract debt, gives his own promissory note for the debt, the presumption, in the absence of any proof to the contrary, is, that such note was accepted by the creditor in satisfaction and discharge of the pre-existing debt, but such a presumption is one of fact only, and may be rebutted and controlled by

any evidence showing that such was not the intention of the parties. Taking the rule as stated, it is supported by many decisions in this State, but it is now generally admitted, wherever this rule prevails, that when it appears that the note was not the obligation of all the parties who were liable for the original debt, and *a fortiori*, when it appears that the note was that of a third party, and if held to be in satisfaction, would wholly discharge the party previously liable, the presumption, if it exist at all, may be repelled by slight circumstances evidencing a contrary intention. *Melledge v. The Boston Iron Company*, 5 Cush. 169.

Courts of justice here and in Maine adhere to the rule, as herein stated, in cases where the party accepting the new evidence of the debtor's promise relinquishes no security for the payment of the debt; but wherever the contrary appears, the manifest tendency of the modern decisions is, to regard that circumstance as affording strong evidence to repel the *prima facie* presumption. Many of the ordinary circumstances, which, as it is held, may have the effect to repel such a presumption are enumerated by Shepley, Ch. J., in *Foster v. Ludwig*, 34 Me. 461, which was referred to by the libellant. He says, if the negotiable paper was accepted in ignorance of the facts, or under a misapprehension of the rights of the parties, it has been held, that the presumption might be considered as rebutted. *French v. Price*, 24 Pick. 13. So if the paper accepted is not binding upon all the parties previously liable, or if the paper of a third person be received not expressly in payment, the presumption may be considered as repelled.

Applying the qualifications to the general rule adopted in those cases, to the facts of this case, it is clear, that the defence cannot prevail for several reasons. Evidence to show that the notes were received expressly in payment is entirely wanting. On the contrary, the clear presumption from the language of the receipts, especially when considered in connection with the circumstances of the transaction, is that they were not so received. The contract was made by the maker of the notes as agent, and that fact was known to the libellant, as is evident from the manner in

which the charges were made for the articles sold and services rendered. No settlement was made when the notes were accepted, and the account was not receipted. Funds were wanted by the libellant, but the agent had none belonging to his principals, and proposed to give his own notes, in a form that would enable the libellant to raise money at the banks. Time notes were accordingly made, without interest, and delivered by the agent to the libellant, but he did not then charge the same to his principals; and the whole transaction on its face shows that the notes were given as a temporary accommodation to the libellant, and not as an absolute payment of the debt.

Circumstances are wholly wanting to show that either party intended to discharge the respondents, and it is their own fault if they have paid the amount to their agent instead of discharging their own obligation.

Cases involving the same conditions as those presented in this case, have so frequently received examination in this court, that it is not deemed necessary to give the subject any further investigation. The decree of the District Court is, therefore, affirmed, with costs.

JAMES W. BADGER *et al.* v. DANIEL B. BADGER *et al.*

Where the answer is responsive to the bill of complaint, and positively denies the matter charged, and the denial has respect to a transaction within the knowledge of the respondent, the answer is evidence in his favor, and unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other facts and circumstances, which give to it greater weight than the answer, or are equivalent in weight to a second witness, it is conclusive, so that the court will neither make a decree or send the case to trial, but will dismiss the bill.

Accusations charging that probate accounts which had been settled for a long time were fraudulent, must be specific, and must point out the items of account charged to be false; especially when, as in this case, it appears that all the parties implicated, some of whom had the best means of knowledge in regard to the transaction, were dead.

If express fraud be charged, the rule is that he who made it must prove it; so where license was granted by the Supreme Court of a State for the sale of real estate by administrators, and the complainant, in a bill of equity, prayed that the deeds of conveyance executed pursuant to the license granted, might be declared null and void, nothing less than proof of fraud could possibly avail the complainant, as the court to whom the petition was addressed was bound to inquire whether debts were due and unpaid by the estate before they granted the license, and, in the absence of fraud, it must be presumed that the finding of the court was conclusive.

In many cases courts of equity act upon the analogy of the limitations at law, as where a legal title would, in ejectment, be barred by twenty years' adverse possession; but there is a defence peculiar to courts of equity, founded on lapse of time, where no statute of limitations governs the case.

In such cases courts of equity often act upon their own inherent doctrine of discouraging antiquated demands, by refusing to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights.

Where the bill of complaint set up that fraudulent acts had been committed more than thirty years previous to the bill of complaint, but the complainant averred that the same were unknown to him until five years previous to the same, without setting up that the fraudulent acts were in any manner concealed from him, it was *held*, that a court of equity could not regard in such a case such general allegations of excuse.

If the complainant seeks to avoid the effect of lapse of time, on the ground of concealed fraud, he must set forth, with particularity, when and by what means the fraud was discovered, and the averments so made must be supported by the proofs.

In the case of a stale claim, barred by lapse of time, by gross laches, and long unexplained acquiescence in the operation of an adverse right, courts of equity will often treat the lapse of a period less than the one specified in the statute of limitations as a presumptive bar to the claim.

THIS was a bill in equity, wherein the complainant prayed, for an account of the rents and profits of certain real estate, that certain deeds of conveyance might be declared null and void, and that the respondent first named, or his representative, might be ordered to convey to the complainant his interest in certain

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real estate, and pay over the proper proportion of whatever sums he or they might have received as rents or profits of the same. The bill of complaint was filed September 6, 1858. When filed, David J. Badger was also joined in the suit as a complainant, but on the 4th of October following, the bill of complaint as to him was dismissed, on motion of the respondent, for the reason that he was joined in the suit without his authority or consent. A plea in bar was filed by Daniel B. Badger, alleging that the complainant, with others, had previously brought a bill of complaint against him for the same matters, and that the former bill of complaint, after testimony was taken, and other proceedings had, was dismissed with costs for the respondents; but the court decided that the former decree was not a bar to the present suit. Pending those proceedings, the first-named respondent deceased, leaving his son, Erastus B. Badger, as his sole devisee, and the suit having been duly revived as against him, he came in, and made answer to the bill of revivor.

Joseph Badger, who was joined as a respondent in the present bill of complaint, after appearing and filing an answer, died also, but the bill of complaint as against him was never revived; and the parties to the suit in all other respects remain as they were described in the original bill. The former suit, already alluded to, was instituted May 8, 1857, and was dismissed on the day the present bill was filed. In the former suit James W. Badger, Augustus H. Badger, Almira A. Badger, B. P. Sturges and Mary H. B. his wife, M. M. Smith and Eliza M. his wife, Alfred C. Badger, and Jacob Badger were complainants. James W. Badger and D. B. Badger were brothers, and the children of Daniel Badger, of Boston, who died in September, 1818, intestate, leaving a widow, Ann Badger, and ten children, to wit, Daniel B., James W., David I., Augustus H., Jacob, Almira A., Mary H. B., Eliza M., Ann J., and Alfred C. Badger. The complainant admitted that David I., on the 25th of September, 1828, conveyed all his right, title, and interest in and to the estates situated in Broad Street and North Federal Court to D. B. Badger, and not being a party to the suit, there was no question as to his share involved in the controversy. Ann J. inter-

married with Thomas Richardson, and they, by deed of warranty, on the 5th of May, 1830, conveyed all their interest in the estate of the intestate to the first-named respondent. Administration on the estate was granted February 29, 1819, to Daniel B. Badger, and Joseph Badger, his uncle, who was the brother of the intestate.

On the 18th of October following, the inventory was filed in the Probate Court, by which it appears that the personal estate was appraised at \$1,721.10, and the real estate at \$12,470. Other personal estate having come to the knowledge of the administrators, to the amount of \$714, they caused the same to be appraised, on the 8th of May, 1820, and filed an additional inventory for that amount. Their first administration account was presented September 25, 1820, and was allowed on the 9th of October following.

The administrators charged themselves with \$6,742.04, and claimed an allowance for \$6,475.52, leaving a balance of \$266.52. The decree allowing that account bore date October 9, 1820, and on the same day, the administrators presented a schedule of the debts due to the estate, amounting to \$3,475.72, and also a list of the debts due and owing by the intestate, at his decease, amounting to \$6,707.58. Both of these schedules were received and ordered to be filed and recorded; and on the same day the administrators petitioned the court for leave to sell so much of the real estate of the deceased as would raise the sum of \$6,451.83. Pursuant to that petition, the administrators, on the 13th of November following, were empowered to sell so much of the real estate as would raise that sum, and incidental charges, amounting in the whole to \$6,511.37. The license to that effect was accordingly granted, and they sold under it, as the complainant alleged, the house and land on Lynde Street, the land and store on Greene's Wharf, one twenty-fourth of house and land on Fleet Street, and house and land in Cambridgeport, amounting in the whole to the sum of \$3,635.

Certain payments were subsequently made by the administrators, to discharge certain mortgage debts due from the estate; but as all such were included in the second administration account, it is not necessary to specify them.

On March 12, 1827, the widow petitioned that her dower in the real estate of the intestate might be set off to her, and on the 6th of April following, the estates in Broad Street and North Federal Court were duly assigned to her in full of her dower.

None of these preliminary proceedings in the settlement of the estate were called in question. On the 17th of September, 1827, the administrators filed their second administration account. In that account they charged themselves with the proceeds of the sale of the real estate before mentioned, and with other sums, amounting in the whole to \$4,354.02, and claimed credit for the sum of \$6,810.35, alleged to be for money expended on account of the estate, including \$1,309 for services alleged to have been rendered by D. B. Badger as administrator, in settling the estate. The complainant averred that those allegations were false; and that the administrators on the same day filed in the Probate Court a further list of debts amounting to \$2,220, falsely alleging that the same were due from the estate; but the complainant charged that these claims were false, and there was nothing due from the estate to the administrators or either of them, or to the holder of the notes specified in the list of debts, or to any person or persons whatever, for which the estate of the deceased was in any way liable. On the contrary, the complainant alleged that the balance of the account was claimed by D. B. Badger, and that the list of debts was filed by him, in violation of his trust and duty as administrator, to enable him to obtain possession for his own use and benefit, of all the remaining real estate of the intestate, situated in Boston, to wit, the estate known as the house and land in Distil House Square, and the house and land situated in Broad Street.

Imputing that motive, the charge was, that to accomplish this design, he, on the first Tuesday of March, 1830, petitioned the Supreme Judicial Court for the county of Suffolk for leave to sell so much of the real estate as was necessary to pay the balance of that account, and that such proceedings were had that the court empowered the administrators to sell so much of the same as would raise the sum of \$4,676.33, and \$50 for incidental charges. Having made these statements, the complainant

then charged that the order of the court and the authority to sell were procured by deception and fraud, and alleged, that in order to procure the consent in writing of Thomas Richardson and Ann J., his wife, to the granting of the petition, he purchased all their right, title, and interest in and to the estate; and that in order to procure the consent in writing of Jacob Badger to the same, he purchased all of his interest in and to the estate in Broad Street and North Federal Court, whereupon those parties consented in writing to the granting of the prayer of the petition; Jacob Badger consenting for himself, and as guardian of Augustus H. Badger. The complainant alleged also that the signature of Almira A. Badger was procured by falsehood and deception, as was also that of her mother, to various papers which the first-named respondent fraudulently used; by means whereof, and of the false representations and fraudulent acts and doings, the authority to sell the estate was granted; that in pursuance of the fraudulent design the house and land in Distil House Square were advertised to be sold at auction in Boston, on the 20th of July, 1830, without giving any notice whatever of the place at which the sale was to be made; that the first-named respondent procured one William P. Hart to bid off the estate for him, and that Hart bid \$2,820, and that the estate was struck off to him for that sum, which was much less than the value of the premises; that subsequently, D. B. Badger, the first-named respondent, caused to be advertised for sale at auction so much of the real estate in Broad Street and North Federal Court, subject to the life estate of the widow, as would raise the sum of \$786, for the payment of alleged debts and incidental charges, and procured the same person to bid off that property for him.

On that occasion, the estate situated in North Federal Court was struck off to one Adin Hall for the sum of \$400, and only about one-fifth part of the Broad Street estate was struck off to William P. Hart; but the complainant alleged, that the respondent pretended to offer those estates for sale at auction again, but without any legal notice, and that the respondent procured the same person to bid off the Broad Street estate for his own benefit, and that the same was struck off to the bidder for \$636, being less

tian one half of the value of the premises, subject to the incumbrance. Both the house and land in Distil House Square and the Broad Street estate were, as the complainant alleged, conveyed by the administrators to the bidder, without his paying anything therefor, and were by him conveyed to D. B. Badger, the first-named respondent, without any further consideration than what was paid to him by the latter for his fraudulent services. On this last occasion, sale was also made of the house and land on North Federal Court, which had previously been bidden off by Adin Hall, and the charge was that the same respondent procured one Daniel Gilpatrick to attend the sale and bid off the property for his benefit; that the same was struck off to the bidder for the sum of \$150, being a sum greatly less than the value of the premises, subject to the incumbrances; that the same was conveyed to the bidder without consideration, and was by him in the same way conveyed to the first-named respondent. Two mortgages were made by the said respondent to Samuel D. Parker, who was also joined as a respondent in the bill of complaint. He mortgaged the house and land in Distil House Square to Parker on the 1st of July, 1854, to secure the payment of \$6,000, payable in three years, and the other mortgage was of the Broad Street estate, and was dated February 14, 1855, to secure the sum of \$1,000, also payable in three years. Conveyance was also made by D. B. Badger, the first-named respondent, to the city of Boston, of the house and land in North Federal Court, and the corporation was also joined as respondent in the bill of complaint.

The complainant also alleged that Samuel D. Parker well knew that his grantor was not possessed of any interest in the estates so conveyed to him, beyond four tenths of the Broad Street estate, and one tenth of the other estate. He also alleged that before the city of Boston paid the consideration and took the delivery of the deed conveying the estate in North Federal Court, the city was duly notified of the rights of the complainant, and of those under whom he claimed. Further the complainant alleged that on June 11, 1858, six of the other heirs, to wit, Augustus H., Almira A., Mary H. B., Eliza M., Jacob, and Al-

fred C., transferred to him all their interest in and to the before-mentioned estates and the profits and proceeds thereof, whereby he became possessed of the same, both at law and in equity, and he finally alleged, that the fraudulent acts and doings of the first-named respondent were unknown to him or to his coheirs, until within five years before the filing of the bill, and that as soon as the discovery thereof, they requested him, the first-named respondent, to account, pay over what was due, and convey to them their respective interests in the estates, which he refused to do.

Answer was filed by Joseph Badger, during his lifetime, in which he denied every material allegation of the bill of complaint; that the administrators' accounts or lists of debts were false, or were filed in the Probate Court with any fraudulent design, were especially denied, and it was averred that they were so rendered and filed because it was the duty of the administrators to render the same. It was admitted, that leave was obtained to sell the real estate of the intestate to pay debts due from the estate, and that the estates mentioned in the bill of complaint were sold in pursuance of the order so obtained, but it was denied, that the license was procured for the fraudulent purpose of enabling the co-administrator to get possession of the estates, or that any fraud or misrepresentation was employed to induce any person to assent to the petition or sale; it was also denied that the sale of the several estates was not duly notified, or that they were not sold at the time they were advertised. Separate answers were also filed by the other respondents, also denying every material allegation of the bill.

J. B. Robb and J. G. Abbott, for complainants.

A person cannot legally purchase on his own account that which his duty or trust requires him to sell on account of another. A purchase by a trustee or *per interpositam personam*, of the particular property of which he has the sale, carries fraud on the face of it. *Blood et al. v. Hayman*, 13 Met. 231.

A purchase so made by executors will be set aside. *Michoud et al. v. Girod et al.*, 4 How. 503.

The purchase of the estates by Daniel B. Badger was accomplished by a series of frauds.

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An administrator is bound to plead the special bar of four years, and it will be waste if he does not do it. *Scott v. Hancock*, 13 Mass. 164, 165; *Richmond, petitioner*, 2 Pick. 567; *Heath v. Wells*, 5 Pick. 140.

Mrs. Badger could not bind her wards by giving her consent to the sale of the estates; it would have been a fraud in her to do so, as she was dowager in the estates to be relieved of the mortgage, which secured the debt. *Scott v. Hancock*, 13 Mass. 168.

If the sales were void, the heirs would have a right to the relief prayed for in the bill, and Daniel B. Badger would hold the estate, if living, as tenant in common with his coheirs, or as trustee for them, unless they were barred by the statute of limitations, or want of diligence in prosecuting their claim, as contended for by the defendant. *Michoud et al. v. Girod et al.*, 4 How. 503.

If the sales were voidable merely, then Badger is answerable in this suit as trustee.

In equity, length of time is no bar to a trust clearly established, and in cases where fraud is imputed, length of time ought not, upon the principles of justice, to be admitted to repel relief. *Baker et ux. v. Whiting et al.*, 3 Sumn. 486; *Elimendorf v. Taylor*, 10 Wheat. 168; *Prout v. Gatz*, 6 Wheat. 481.

In either case, the action may be maintained by the present plaintiff as assignee of his coheirs. *Baker et ux. v. Whiting et al.*, 3 Sumn. 486; *Michoud et al. v. Girod et al.*, 4 How. 503.

The conveyances of the estates in mortgage were void as against the plaintiff.

B. R. Curtis and *E. Merwin*, for respondents.

The title which the complainant sets up in his bill is invalid, and one that a court of equity will not recognize.

The sales of real estate by the administrators at auction, in pursuance of the order of the Supreme Court, and their deeds, conveyed the legal title to the grantee; and the right of the heirs to avoid this sale is only a right to bring a suit in equity for relief against the alleged fraud, and this right cannot be assigned. *Harrington v. Brown*, 5 Pick. 519; *Prosser v. Edmonds*, 1 Younge & Coll. 489, 2 Story Eq. Juris. 356.

A court of equity will not countenance an assignment made

under circumstances like those in the present case, for the purpose of enabling the parties to come in, and support it as witnesses by their own testimony. *Bell v. Smith*, 5 B. & C. 188.

No weight will be given to the testimony of witnesses thus made for the case. *Myre v. Ludwig*, 1 Penn. (Barr.) 47-52.

Mrs. Sturges could only transfer her interest by a deed in which her husband joined with her, they being residents of Massachusetts. Mass. Rev. Stat. c. 59, § 2.

Courts of equity will not, upon the suggestion of fraud, undertake collaterally to revise the decree of a competent tribunal; but the party must seek his remedy directly in the forum whose decree he desires to have revised or annulled, by proper proceedings therein. *Jennison v. Hapgood*, 7 Pick. 1; *Paine v. Stone*, 10 Pick. 75; *Vaughn et al. v. Northrop*, 15 Pet. 1; *Laughton v. Atkins*, 1 Pick. 535-547.

These decrees, therefore, are conclusive upon the complainant in the present controversy, and must be taken to have been just and well founded.

This bill does not contain such allegations in regard to fraud as are necessary to induce a court of equity to re-examine the decrees.

The particular errors must be specified, and the bill must allege how, when, and in what manner the fraud was perpetrated. *Stearns v. Page*, 7 How. 819; 1 Dan. Ch. Prac. 424.

Fraud will not be presumed, but must be clearly proved; and a court of equity will apply this just rule most rigidly in a case like the present one, where the claim is so stale, and the complainants have neglected to present it, not through any misapprehension, but for purposes of their own, until the means of proving the truth are lost, and the parties most interested are dead.

To avoid the effect of the Statute of Limitation, or the lapse of time, on the ground of concealed fraud, the complainant must set forth with particularity, when and by what means the fraud was discovered, and the averment must be supported by the proofs. *Stearns v. Page*, 7 How. 829; *Wagner v. Baird*, 7 How. 258; *Fisher v. Boody*, 1 Cur. 218; *Carr v. Hilton*, 1 Cur. 392; *Moore v. Greene*, 2 Cur. 202. See also *Andrew v. Wrigley*, 4

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Brown's Ch. R. 125; *Beckford v. Wade*, 17 Ves. 94, 97, *et seq.*; *Jenkins v. Pye*, 12 Pet. 241; *Hovenden v. Annesley*, 2 Sch. & Lef. 636.

The Statute of Limitations is a positive bar, and operates in equity, *ex vigore suo*, as well as at law, in all matters of concurrent jurisdiction, or of a similar nature. 2 Story's Eq. Jur. § 1520, and notes; *Farnum v. Brooks*, 9 Pick. 212, 243; *Wagner v. Baird*, 7 How. 234, 258; *Moore v. Greene*, 2 Cur. 202.

And where it is not directly applicable, courts of equity will apply the bar, and will refuse their aid after a lapse of twenty years, and often within a less period. 2 Sugden Vend. & P. (7th Amer. ed.) 899; *Roberts v. Tunstall*, 4 Hare, 257; *Gregory v. Gregory*, Cooper, 201; *McKnight v. Taylor*, 1 How. 168; *Bowman v. Wathen*, 1 How. 189; *Andrew v. Wrigley*, 1 Brown's Ch. R. 125; *Morse v. Royal*, 12 Ves. 377.

CLIFFORD, J. Where the answer is responsive to the bill of complaint, and positively denies the matter charged, and the denial has respect to a transaction within the knowledge of the respondent, the answer is evidence in his favor, and unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other facts and circumstances, which give to it greater weight than the answer, or which are equivalent in weight to a second witness, it is conclusive, so that the court will neither make a decree nor send the case to trial, but will simply dismiss the bill of complaint. 2 Story's Eq. Juris. (8th ed.) 1528; *Pember v. Mathers*, 1 Bro. Ch. R. 52; *Walton v. Hobb*, 2 Atkins, 19; *Clark's Ex'rs v. Van Reimsdyk*, 9 Cran. 160.

Keeping that principle constantly in view, it will become necessary to look at the evidence with some care in order to ascertain what is the true state of the facts in regard to the matters in controversy between the parties. The administrators were lawfully appointed and duly qualified according to law to discharge their duties as such, and it is not denied, that an inventory of the estate of the intestate was duly made and returned, nor is it pretended that the administrators have not fully and justly administered the personal estate. They settled their first administration

account on the 9th of October, 1820, and no attempt is made to impeach the decree allowing the same and ordering it to be recorded. By the copy of the record it appears, that they charged themselves in that account with all the personal estate as the same was appraised, which, with other charges, as therein specified, amounted to \$6,742.04, and were allowed for sums paid out on account of the estate, \$6,475.52, which left only a balance of \$266.52 in their hands. On the same day they filed a list of debts due and owing by the estate, and a schedule of debts not collected, and supposed to be due to the estate. The debts due to the estate might not be collected, but such as were owed by the estate must be paid, and they accordingly, on the same day, petitioned the Court of Probate for license to sell real estate for that purpose; and the bill of complaint admits that on the 13th of the same month, they, as such administrators, were authorized to sell so much of the real estate of the intestate as would raise the sum of \$6,511.37. Pursuant to that authority, sales of real estate were made by the administrators, to the amount of \$3,635, and no fraud or irregularity in that behalf is charged upon the administrators. Other debts to a large amount were due and unpaid by the estate, but the authority conferred upon the administrators to sell the real estate for that purpose, although not exhausted, was not further exercised, and the creditors appear to have acquiesced in the delay. Nothing further was done in the Probate Court until the 12th of March, 1827, when the widow of the intestate petitioned to have her dower set off to her, and on the 6th of April following, the estates mentioned in the bill of complaint were assigned to her in full of her dower. The second administration account was presented by the administrators on the 10th of September, 1827, and, on the 17th of the same month, the same was allowed and ordered to be recorded. All sums received by the sales of the real estate were duly charged in the account, and it is not even suggested that there is any error in that part of the account. The list of debts filed and recorded on the 9th of October, 1820, included three notes, described as notes in bank, secured by mortgage, dated November 1, 1818, and were carried out in the account as amounting to

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\$3,000. Immediately under the same is also another sum of \$345, described as interest on the above. Included in the same list, is a note to D. Pulsifer, for \$100, but whether on interest or not does not appear. When the administrators presented their second administration account, they also filed another list of debts due by the estate, amounting in the whole to the sum of \$2,220. Three items only are included in that list, consisting of two notes at bank, secured by mortgage, amounting to \$2,000, and one year's interest on the above carried out \$120; and the remaining item is one note to D. Pulsifer, \$100, which plainly is the same note as that specified in the first list of debts. Decree was entered on the same day the second administration account was allowed, ordering the list of debts to be filed and recorded. The former license to sell real estate having expired by lapse of time, these proceedings in the Probate Court were necessary to lay the proper foundation for an application to the Supreme Judicial Court for a renewal of the authority to sell. Notice to all persons interested, however, is required before decree, unless the parties voluntarily appear, and assent to the same, or in some way signify their assent in writing, which is often done in probate proceedings, in order to save the expense of publication. Accordingly, both the second administration account and the second list of debts were respectively examined and approved by and in behalf of all the heirs to the estate, and there is no allegation in the bill of complaint that the signatures of the parties to these papers are not genuine, or that they were unfairly obtained. Those writings are signed by each of the four heirs, who were then of age, and by the widow, for herself and the six minor children. The complainant charges that the account was false and fraudulent, and that there was nothing due from the estate to the administrators, or to any other person, but he does not allege that the guardian was guilty of any fraud in approving the account and list of debts, or that her signature to these writings was improperly procured.

Accusations like these, appertaining as they do to probate accounts formally settled more than thirty years ago, ought to be specific, and point out the items of the account which are alleged

to be false, especially when, as in this case, it appears that all the parties implicated, and many of those who had the best means of knowledge in regard to the transactions are dead. The administrators charged \$1,309 for the time and trouble of the first-named respondent, in settling the estate, and that amount was allowed in the account for his services. A specification of that item as a false one, is made in the bill of complaint, and it is the only one pointed out in that account as false.

Much testimony was introduced to show that D. B. Badger, when he was appointed, agreed to serve without charge, but after the lapse of thirty-five years the written assent of the heirs to the account, certifying that they had examined and approved the same, must be regarded as a conclusive answer to that imputation. Falsity is also imputed to the second list of debts, as recorded on the 17th of September, 1827; but it is evident, upon comparing the same with the list recorded on the 9th of October, 1820, that the two are the same so far as respects the items embraced in the second list. Three mortgage notes were filed in the first list, and but two in the second. Interest to the amount of \$345 was charged in the first, as arising on those mortgage notes, but the amount set down in the second list is but \$120. Taking the facts as they appear on the face of the papers, it is a reasonable presumption that one of the notes had been paid, and that all the interest on the other two had been paid, except for the last preceding year before the list was filed. Inference, however, need not be resorted to, as it expressly appears that the first note, and interest on the three notes to the amount of \$378.30, were paid by the administrators, and the amount was allowed in the second administration account. Evidently, therefore, the notes were payable with interest, and the clear inference is, that all the accruing interest, except for one year, had been paid, or in some manner liquidated, when the second list of debts was presented. The petition for a renewal of the license to sell real estate, was presented by the administrators on the first Tuesday of March, 1830, to the Supreme Judicial Court for the county of Suffolk. They state in their petition that they obtained such license from the Probate Court on the 13th of November, 1820; that they

refrained from exercising the entire power so granted, at the request of the heirs and their guardians, and in the belief that the price of the real estate would be increased by the delay. The receipt of notice was acknowledged by the widow, heirs, and guardians, and they waived all objection to the granting of the prayer of the petition. Notice having been acknowledged, and all objections waived, the decree ordering the license was entered at the same term in which the petition was presented. Sales were accordingly made of the house and land in Cambridgeport; houses and land in Distil House Square; an undivided part of an estate situated in Lynn; house and land situated in North Federal Court, subject to the life estate of the widow; and house and land in Broad Street, which was also subject to the widow's right of dower. The aggregate amount of the sales was \$4,723.50, as fully and regularly appears, by the respective returns of sales duly made and sworn to by the administrators on the 25th of April, 1831, filed in the Probate Court for the proper county. Having completed these proceedings, and given public notice to all persons interested, the administrators presented their third administration account. Credit was duly given to the estate for the amount received for the sales of real estate; and they were allowed, for payments made and expenses incurred on account of the estate, the sum of \$4,774.65, leaving a small balance against the estate. It is not pretended that there is any error in the form of these proceedings, and the pretence, if set up, could not be sustained for a moment, as it is obvious, from an inspection of the record that so far as form is concerned, from the appointment of the administrators to the final settlement of the third administration account, every step taken in the proceedings was correct and according to law.

Four principal objections are taken by the complainant to the legality of the proceedings: first, the one before mentioned, that the charge for services in the second administration account, and the second list of debts presented on the same day to the Probate Court, were false and fraudulent; secondly, that the license granted by the Supreme Judicial Court, for the sale of real estate, was fraudulently obtained; thirdly, that the administrators

intentionally neglected to give proper notice of the time and place of sale of the estates, for the fraudulent purpose of enabling the first-named respondent to purchase the same at a price below their real value ; fourthly, that he employed two persons to attend the sales, and bid off the estates, and that they accordingly attended, and bid off certain parcels of the estates for his use and benefit, and subsequently conveyed the same to their employer, without any compensation except what was paid to them for their illegal services.

Sufficient has already been remarked to show that the first objection cannot be sustained. More than thirty-one years have elapsed since the third administration account was settled, and now, when the administrators who made the account, and presented the list of debts, and the guardian of the complainant, who approved the same, are dead, it is but just to hold that a party making such a charge, under such circumstances, shall be required to prove the charge by full and satisfactory evidence.

Express fraud, also, is the foundation of the second objection, and in respect to that charge the rule is, that he who makes it must prove it. Nothing less than proof of fraud could possibly avail the complainant in this case, as the court to whom the petition was addressed was bound to inquire whether debts were due and unpaid by the estate, before they granted the license, and, in the absence of fraud, it must be assumed that the finding of the court is conclusive. *Grignon's Lessee v. Astor et al.*, 2 How. 319. Several suggestions are made to show that the license was obtained by fraud, but no one of them is satisfactorily proved. One is, that the notes embraced in the second list of debts were barred by the Statute of Limitations, but the clear inference from all the circumstances is otherwise, as has already appeared. Those notes were subsequently paid by the administrators, and charged in their third administration account, and no one of the heirs made any opposition to the decree allowing the same, although duly notified to appear and show cause, if any they had, why the same should not be approved. Another suggestion is, that the assent of the widow and heirs to the petition for the

license to sell was improperly obtained, but the suggestion is not sustained by any satisfactory proof. Some attempt was made to show that the signature of the widow is not genuine, but the weight of the evidence clearly shows, that she either signed her name, or authorized it to be placed to the instrument.

Satisfactory proof that notice of the time and place of sale was given is exhibited in respect to every parcel sold under the license obtained from the Supreme Judicial Court. None of the sales effected under the license from the Probate Court are drawn in question, and of course nothing need be remarked in regard to those sales.

Testimony was introduced by the complainant, tending to prove that the first-named respondent, who was one of the administrators of the estate, employed one William P. Hart to attend the sale of real estate on the 20th of July, 1830, for the purpose of bidding off, for his own use and benefit, some portion of the estate which was advertised to be sold on that day, and that he accordingly attended the sale, and on that occasion he was the highest bidder, on the parcel situate in Distil House Square, and the same was struck off to him for the sum of \$2,820, as specified in the third administration account. The administrators conveyed the same to William P. Hart, on the 23d of July, 1830, and, on the 14th of March, 1831, the grantee in that deed conveyed the same to the first-named respondent. Evidence was also introduced by the complainant, tending to show that he procured in like manner the same person, and also one Daniel Gillpatrick, to attend the sale of the real estate advertised to be sold on the 12th of March, 1831, to bid off some portion of the estate for his own use and benefit, and that the former was the highest bidder for the house and land situated in North Federal Court, and that the same was struck off to him, subject to the life estate of the widow, for the sum of \$150, and that the latter was the highest bidder for the house and land situated in Brown Street, subject to the widow's right of dower, and the same was struck off to him for the sum of \$613, as appears by a copy of the proceeding, as recorded in the Probate Court on the return of the sales. Conveyances were duly made

by the administrators to the respective bidders, and they subsequently conveyed their respective interests to the first-named respondent. A fraudulent design is charged by the complainant in respect to the employment of these persons to bid on the real estate, but proof to that effect is wholly wanting in the record. On the contrary, the evidence shows to the satisfaction of the court, that the sales were properly advertised, and in all other respects properly conducted, and that every reasonable exertion was made by the administrators to procure the attendance of bidders, and to obtain the best prices for the estates. The evidence clearly shows that the senior administrator neither employed those persons to bid, or had any knowledge that they or either of them had been employed by his associate. It is insisted by the complainant on this branch of the case, that the sales to Hart and Gillpatrick were absolutely void, because in bidding off the same they acted as the agents of the administrators. *Michoud v. Girod*, 4 How. 552.

On the other hand, it is insisted by the respondents, that inasmuch as the case made in the bill of complaint is one of actual, positive fraud, that the complainant is not entitled to relief, unless he proves those allegations; that having charged actual fraud, he cannot now abandon that ground and show himself entitled to relief by proving constructive fraud, arising out of the peculiar relation between himself and the first-named respondent. Support of that proposition is certainly found in *Eyre v. Potter*, 15 How. 54; but in the view taken of this case, it will not be necessary to decide that question in the present controversy, because I am of the opinion that the claim of the complainant is barred by lapse of time. Courts of equity, says Mr. Justice Grier, in *Wagner et al. v. Baird et al.*, 7 How. 258, in cases of concurrent jurisdiction, consider themselves bound by the Statutes of Limitation, which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy. In many other cases they act upon the analogy of the limitations at law, as where a legal title would, in ejectment, be barred by twenty years' adverse possession, courts of equity will act upon the like limitation, and apply it to all cases of relief sought upon

equitable titles, or claims, touching real estate. *Moore v. Greene*, 2 Cur. 202; 2 Story's Eq. Jurs. (8th ed.) 1520; *Farnum v. Brooks*, 9 Pick. 243. But, says the same learned judge, there is a defence peculiar to courts of equity, founded on lapse of time, and the staleness of the claim, where no Statute of Limitation governs the case. In such cases, courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere, where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. 2 Sugden Vend. & P. (7th Am. ed.) 899; *Roberts v. Tunstall*, 4 Hare, 285; *Jenkins v. Pye*, 12 Pet. 241; *Hovenden v. Annesley*, 2 Sch. & Lef. 636; *Sullivan et al. v. Sullivan et al.*, 21 Law Rep. 531; *McKnight v. Taylor*, 1 How. 168. Long acquiescence and laches by parties out of possession, are productive of much hardship and injustice to others, and cannot be excused, but by showing some actual hindrance, or impediment, caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor. Sales in this case, which the complainant seeks to set aside, were made in 1830 and 1831, more than thirty years ago, and no reason or excuse is assigned for the delay. Present suit was instituted on the 6th of September, 1858. Complainant, it is true, alleges that the fraudulent acts and doings, of Daniel B. Badger were unknown to him until, within five years last past, but the bill of complaint does not allege that the same were in any manner concealed from him, or when or by what means the fraud was discovered. Such general and unsubstantial allegations of excuse cannot be regarded by a court of equity as sufficient. On the contrary, it is well settled, that if the complainant would avoid the effect of lapse of time, or of the Statute of Limitations, on the ground of concealed fraud, he must set forth with particularity when and by what means the fraud was discovered, and the averment so made must be supported by the proofs. *Stearns v. Page*, 7 How. 829; *Wagner v. Baird*, 7 How. 258; *Fisher v. Boody*, 1 Cur. 218; *Carr v. Hilton*, 1 Cur. 392; *Moore v. Green*, 2 Cur. 202. Many of the heirs have been examined as witnesses,

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and not one of them has testified to any concealment on the part of the respondent, or any ignorance upon the subject. His counsel insist that the claim is not barred, because the properties were subject to a life estate which did not terminate until the 24th of September, 1855, when the widow of the intestate deceased; but I am of the opinion that the continuance of her life estate has no effect upon the question of limitation in this case. The purchasers took an absolute title in the estates as against the complainant, and those under whom he claims; and in equity the rule is, that the question of acquiescence is not affected by the circumstance that the particular estate had not determined during the lapse of time, since the conveyance might at any time have been avoided, if obtained by fraud, as alleged. *Sullivan et al. v. Sullivan et al.*, 21 Law Rep. 531; *Andrew v. Wingly*, 4 Brown's Ch. R. 125; *Bickford v. Wade*, 17 Ves. Jr. 94, 97; *Jenkins v. Pye*, 12 Pet. 241; *Hovendon v. Lord Annesley*, 2 Sch. & Lef. 636; *Bowman et al. v. Wathen*, 1 How. 193.

Applying these principles to the present case, I am of the opinion that the claim in this case is barred by the limitation of twenty years. When the sales were made, the complainant, and those under whom he claims, were minors, and consequently within the exception of the statute, but the proof is full to the point, that all of them, except the complainant, had been of age more than twenty years when the first suit in this case was commenced. The age of the complainant does not distinctly appear, and it may be that he had not been of age twenty years on the 8th of May, 1857, when the former suit was commenced. Proofs on this point are not clear, and perhaps it would be going too far to say that his original share of one tenth is barred by that limitation. But if that be so, still I am of the opinion that the entire claim is barred, as a stale claim, upon the ground of gross laches, and long unexplained acquiescence in the operation of an adverse right. Under such circumstances courts of equity will often treat a lapse of a less period than the one specified in the Statute of Limitations as a presumptive bar to the claim. *Smith v. Clay*, Amb. 645; *Kane v. Bloodgood*, 7 Johns. Ch. R. 93; *Dexter v. Arnould*, 3 Sumn. 152; *Provost v. Gratz*, 6 Wheat. 461; 2 Story's Eq. Juris.

(8th ed.) § 1520. Another answer to the claim may also be given, which is as applicable to the complainant as to those under whom he claims. Actions for lands sold by executors, administrators, or guardians cannot be maintained in this State by any heir or other person claiming under the deceased testator or intestate, unless the same be commenced within five years next after the sale. Rev. Stat. Mass. c. 71, § 37, p. 458; c. 72, § 19, p. 461. Objection is made by the complainant that this limitation cannot operate, because it is not set up in the answer. But the objection, I think, is not well taken, as applied to the present case. Courts of equity, says Judge Story, act upon the analogy of the law, as to the Statute of Limitations, and will not entertain a suit for relief, if it would be barred at law. If the objection does not appear on the face of the bill, it may be taken by way of plea or by way of answer; but the clear inference is, that the learned author did not regard the plea or answer as necessary when the objection was apparent on the face of the bill of complaint. Story's Eq. Plea. § 503; Cooper's Eq. Plea. 167; Mitford's Pl. by Jeremy, 212; *Maxwell v. Kennedy*, 8 How. 222; *Hovoden v. Annesley*, 2 Sch. & Lef. 638.

In view of the whole case, I am of the opinion that the complainant is not entitled to relief, and the bill of complaint is accordingly dismissed with costs.

ELKANAH BANGS *et al.* v. WILLIAM LOWBER *et al.*

A vessel, while on a voyage to Melbourne, was chartered by the managing owners to defendants, for a voyage from Calcutta to a port in the United States. The charter-party contained a clause that the vessel was to "proceed from Melbourne to Calcutta with all possible despatch."

Before the master was advised of this engagement, the vessel had sailed from Melbourne to Manilla, seeking business, and did not arrive at Calcutta as soon as the parties had contemplated. The defendants refused to load the vessel; and upon suit to recover damages for a breach of the charter-party, brought by the managing owners, who were described therein as "owners" of the vessel, it was *held*, that although there were other owners, the suit was rightly brought in the names of those subscribing the charter-party in good faith.

It was also *held*, that the clause quoted above was not a condition precedent, but an independent stipulation, which gave the charterers a claim for damages, on failure of performance by the owners, but did not give them the right to avoid the contract, because it appeared that the object of the voyage was not wholly frustrated thereby.

THIS was an action of assumpsit, and came before the court on an agreed statement of facts, from which it appeared that on the 9th of June, 1858, while the ship *Mary Bangs* was on a voyage from New York to Melbourne, the plaintiffs, who were managing owners, entered into a charter-party with defendants, in which it was agreed, that the vessel should "proceed from Melbourne to Calcutta with all possible despatch," and there receive a full cargo, to be provided by defendants, and transport the same to a port of discharge in the United States; that, although the plaintiffs used due diligence in informing the master of the ship of this contract, the information, owing to an interruption of the mails, did not reach him until he had left Melbourne and arrived at Manilla with his vessel, in search of business. Upon receipt of this intelligence he sailed for Calcutta; where he arrived the 26th of February, 1859, and reported himself to defendants' agent as ready to receive cargo. Besides the *Mary Bangs*, the defendants, at about the same time, chartered two other vessels for a voyage from Calcutta to the United States, and placed their agents there in funds to lade them as well as the *Mary Bangs*. As soon as they learned that the *Mary Bangs* had sailed from Melbourne to Manilla, they instructed their agents at Calcutta

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that this deviation nullified the engagement, which they considered a fortunate circumstance, as freights had fallen ; and, under their instructions, the agent declined to furnish a cargo for her, but took up another vessel, and loaded her with a cargo purchased after the arrival at Calcutta of the *Mary Bangs*, with funds originally provided by defendants to freight the latter vessel.

The action was brought by the managing owners, who subscribed the charter-party, as "owners," to recover damages for breach of defendants' engagement to lade the vessel ; and it was agreed that, if the court were of opinion they could maintain the action, an assessor should be appointed to ascertain the amount of damages they were entitled to recover.

B. R. Curtis and G. O. Shattuck, for plaintiffs.

It has been decided in a large number of English cases, that such clauses as "ship to proceed with all convenient speed," or "in a reasonable time," or "with all possible despatch," and similar clauses, are not, in charter-parties, conditions precedent, but are merely independent stipulations ; and, unless the alleged breach goes to the whole root and consideration, it only gives a claim for damages. *Clipsham v. Vertue*, 5 Ad. & E., N. S. 265 ; *Fothergill v. Walton*, 8 Taunt. 576 ; *Freeman v. Taylor*, 8 Bing. 124 ; *Tarrabochia v. Hickie*, 1 H. & N. 183 ; *Hurst v. Usborne*, 18 C. B. 144 ; *Seeger v. Duthie*, 8 J. Sco. N. S. 45 ; *Dimech v. Cortlett*, 12 Moo. P. C. 199 ; *Behn v. Burness*, 5 L. T., N. S. 207.

In some cases, it was held in England, that a stipulation in a charter to sail on or before a day certain was a condition precedent ; and such stipulations were distinguished from those containing the words, "all convenient speed," "within a reasonable time," and "with all possible despatch." *Glaholm v. Hayes*, 2 Man. & G. 257 ; *Ollive v. Booker*, 1 Exch. 416.

In *Boone v. Eyre*, 1 H. Black. 273, note, Lord Mansfield laid down the following rule : "When mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other ; but where they go only to part, where a breach may be paid for in damages, then the

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defendant has a remedy on his covenant, and shall not plead it as a condition precedent." See Abbott on Ship. 266; *Davidson v. Gwynn*, 12 East, 381; *Mill-Dam Foundry v. Hovey*, 21 Pick. 417, 437; *Philadelphia, R. Co. v. Howard*, 13 How. 307.

The burden is on the defendants to show that the object of their voyage was frustrated. *Dimech v. Corbett*, 12 Moo. P. C. 199; *Tarrabochia v. Hickie*, 1 H. & N. 183.

The action was properly brought in the name of the part owners, by whom the charter was made. *Seeger v. Duthie*, 8 J. Scott, N. S. 45.

S. Bartlett, for defendants.

It is clearly settled that having in the contract declared themselves "owners," the plaintiffs are not by law allowed to show that they were "managing owners and the ship's husbands," that is to say, agents of the other owners. *Humble v. Hunter*, 12 Ad. & E., N. S. 310.

It is unnecessary to consider what would have been the rights or form of action in behalf of the other owners, if the defendants had entered into the possession of, and used the vessel for the voyage. The fact that the contract has never been executed, and no change occurred in the position of parties disposes of that question. *Rayner v. Grote*, 15 Mee. & W. 359-365.

It is a well-established rule of construction, that the words added in writing to the printed formula, are to have a greater effect given to them, than the printed words (in case of any doubt upon the sense or meaning of the whole), as the written words are the immediate language and terms stated by the parties themselves for the expression of their meaning. Arn. on Ins. 80; *Roberson v. French*, 4 East, 130; *Coster v. Phoenix Ins. Co.*, 2 Wash. 51; *Delonguemare v. Trad. Ins. Co.*, 2 Hall, 589-622; *Wallace v. Ins. Co.*, 4 La. 289; *Weisser v. Maitland*, 3 Sandf. 318, 322.

In all mercantile contracts, and more especially in contracts of affreightment, time is not merely an essential element, but is of the essence of the contract itself. The merchant has this always in view in planning his voyages, ordering his cargoes, and calculating in regard to the markets of the different countries.

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This each party had in view in making the charter, and we accordingly find that they inserted special clauses, in writing on this subject, viz. the words, "ship to proceed from Melbourne to Calcutta with all possible despatch," and "that the owners will use the most direct means to forward instructions to the master with copy of this charter, ordering it to be fulfilled, but should it so happen the ship should arrive at Melbourne before these instructions, and the master should have engaged his ship before receiving them, this charter shall be void."

It is material upon this head, to bear in mind, that this ship at the time of the charter was on a voyage to Melbourne, and that the only instructions which the master had were verbal, "to seek business, and do the best he could in getting freight at Melbourne or elsewhere."

On behalf of the defendants, it is maintained, that upon the true construction of the charter-party, having reference to the purposes and objects of the parties, and considering all its parts and clauses, the finding the vessel at Melbourne upon receipt of such despatches, and disengaged, is to be construed a condition precedent on which the whole contract was to depend.

In other words, that the plaintiffs did in fact warrant, so far as to make it a condition precedent to the vitality of the contract, that such should be the case.

In considering this matter, it is always to be borne in mind that the contract in suit is executory, and not executed; that the plaintiffs are seeking to recover damages for the breach, and not compensation for performance.

Whether or not a particular stipulation in an agreement shall operate as a warranty or condition precedent, the non-observance or performance of which will dispense with the performance of the contract by the other, or as an independent stipulation or agreement, is to be determined, not by any particular phrases, or any special collocation of words, but from the intent of the parties, to be collected from the language used by them, the subject-matter of the contract, and the surrounding circumstances. *Havelock v. Geddes*, 10 East, 555.

If the non-performance of any particular agreement or cov-

enant goes to the whole root and consideration of the contract, then such covenant or agreement is a condition precedent. *Havelock v. Geddes*, above cited; *Davidson v. Gwynne*, 12 East, 380, 381; *Stavers v. Curling*, 3 Bing. N. C. 355.

In the case at bar, the breach of the agreement or covenant on the part of the plaintiffs did go to the whole root and consideration, and did deprive the defendants of the entire use of the ship. The authorities clearly support the position of the defendants in this matter. *Shadforth v. Higgin*, 3 Campb. 385; *Shubrick v. Salmond*, 3 Burr. 1637; *Glaholm v. Hayes*, 2 Scott, N. R. 471; *Ollive v. Booker*, 1 Exch. Rep. 416; *Weisser v. Maitland*, 3 Sandf. 318.

The words in the charter-party, "ship to proceed from Melbourne to Calcutta with all possible despatch," constitute a plain and clear warranty that the vessel should so proceed (if the contract attached); and the vessel having gone another voyage to Manilla, the defendants were released from the obligation to load the vessel.

This is manifest from the place which this clause occupies in the agreement, and from its peculiar language.

All the other clauses of the charter-party are found strictly and properly in the language of agreement only; while this is otherwise, showing that a difference was intended, and none can be suggested than that one sounds in agreement, and the other in condition.

The words themselves, "ship to proceed," &c., by common usage import the same as "conditioned to proceed," as the words, "on or before a given day," do by common usage import the same as "conditioned to sail or warranted to sail."

Looking at the subject-matter of the contract, without regarding the precise words, construing the words as a condition precedent, will carry into effect the intention of the parties, with more certainty than holding them to be matter of contract only, and merely the ground of an action for damages.

The defendant's case must not be confounded with the class of cases where the charterer has received the benefit of the charter, or given by his acts a construction to the contract, or waived the

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performance of the condition precedent. Such are *Constable v. Cloberie*, Pal. 397; *Bornman v. Tooke*, 1 Campb. 377; *Davidson v. Gwynne*, 12 East, 381; *Havelock v. Geddes*, 10 East, 555; *Ritchie v. Atkinson*, 10 East, 295; *Boone v. Eyre*, 2 Black. H. 1312.

If these positions are wrong, still it must have been contemplated by the parties, that the vessel must have been ready to prosecute the adventure in a reasonable time, and the great length of time which elapsed, discharged the defendants from any obligation to load her.

The same doctrine in regard to deviation and delay, as affecting policies of insurance, apply to charter-parties; and whenever the delay or detention is such as would release an underwriter, a charterer will be discharged from his obligations under the charter. *Mount v. Larkins*, 8 Bing. 108; *Freeman v. Taylor*, 8 Bing. 124; *Palmer v. Marshall*, 8 Bing. 317; Abb. on Ship. (ed. 1846,) 325.

The provision of the charter-party, that if the master should have engaged his vessel before receiving instructions, the charter should be void, is satisfied, by his having proceeded on another voyage, in search of other business.

The term "engaged" does not here mean merely that the vessel should have been chartered or taken up by freighters, for another business. It has a wide and more comprehensive meaning; that is, that the master of the vessel should not have embarked his vessel upon another voyage, whether a sailing or freighting voyage. This provision was not inserted merely for the benefit of the plaintiffs; it benefits the defendants as well. When, therefore, the vessel finally departed from Melbourne, whether in ballast or otherwise, she was "engaged" in other business. If the master, on arrival at Manilla, had found a freight, the matter would have ended. He went there to seek one, and the defendants' obligations are as well thereby discharged. *Soames v. Lonergan*, 2 B. & C. 564.

CLIFFORD, J. Suit is brought in the name of the managing owners; and it is objected by the defendants, that it cannot be maintained, because the other owners of the vessel are not

joined ; but the suit is upon the charter, and inasmuch as the other owners are not named in the contract, they could not be joined in the suit ; so that, unless the action can be maintained in the present form, the owners are without remedy. Much reliance is placed by the defendants upon the case of *Humble v. Hunter*, 12 Ad. & E., N. S. 310, to sustain the objection ; but it does not appear to support the doctrine for which it is cited. The charter-party in that case had been executed in the name of the son ; but the suit was in the name of the mother, who was the sole owner of the vessel. Parol proof was offered at the trial to show that the mother was the real owner of the vessel, and that the son had signed the charter-party as her agent, and not as principal. Objection was duly made to the admissibility of the evidence, because the son was described in the charter-party as the owner of the vessel ; but it was admitted, and the jury returned their verdict in favor of the plaintiff. Whereupon the defendant obtained a rule *nisi* to set the verdict aside ; and, after argument, it was made absolute, upon the ground that the parol evidence went to contradict the written contract. *Lucas v. Delaware*, 1 M. & S. 249 ; *Robson v. Drummond*, 2 B. & A. 303. No such question, however, arises in this case, as is obvious from the first reading of the agreed statement. The managing owners and ship's husband executed the charter-party in their own name ; and, having brought suit to recover damages for a breach of the contract, the defendants offer to prove that other persons are also part-owners of the vessel. They do not prove, or offer to prove, that the plaintiffs were not fully authorized to make the contract on which the suit is brought, or that the vessel was not rightfully in their possession and under their control. Where the minority in interest refuse to participate in the voyage, vessels are often employed by those owning the majority interest ; and, if the latter have the lawful possession and control of the vessel, it has never been held that a charter-party executed by them was invalid ; and, if obligatory upon the ship, no reason is perceived why it should not be equally so upon the charterers. Enough is not proved in this case to defeat the right of recovery, even if the objection under other circumstances would be a valid one ; and

upon that ground alone, it must be overruled ; but I am of the opinion that a charter-party, executed in good faith in the name of the managing owners and ship's husband, is a valid instrument, binding upon all concerned, and that a suit for damages founded upon the same is well brought in the names of the owners expressed in the instrument. *Seeger v. Duthie et al.*, 8 J. Sco. N. S. 55.

Two principal positions are assumed by the defendants to show that the plaintiffs ought not to prevail upon the merits.

They insist, in the first place, that, by the true construction of the charter-party, it was a condition precedent, that the owners should use the most direct means to forward instructions to the master ; and that, upon the receipt of the same, the vessel should be found at Melbourne, and disengaged. Proper means, it is admitted, were used by the owners to forward the instructions ; but the position is that, inasmuch as the vessel had left Melbourne before they were received, the stipulations of the charter-party did not attach at all, because the parties contemplated that the vessel would be at that port, ready to proceed to Calcutta with all possible despatch.

Secondly, they insist that if, by the true construction of the charter-party, its provisions attached to the ship wherever found, still it must have a reasonable interpretation as to time, and that the long period which elapsed before the vessel arrived at Calcutta discharged the defendants from any obligation to load her. Several other propositions are submitted by the defendants ; but those already mentioned embrace the whole substance of the defence, as understood by the court.

Whether a particular covenant is to constitute a condition precedent, depends upon the intention of the parties, as it is to be collected from the instrument in which the covenant is contained. Such was the rule laid down by Lord Ellenborough, in *Havelock v. Geddes*, 10 East, 563 ; and it is one often cited and universally approved. Charter-parties are commercial instruments ; and their construction should be liberal, agreeable to the intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates. Abb.

on Ship. 326. Questions of this nature frequently arise ; and there are few that are more difficult to solve, or of more practical importance. Intention is the primary rule ; and when that is discovered, as was well said in the case of *Stavers v. Curling*, 8 Bing. N. C. 355, all technical forms of expression must give way. Undoubtedly, a particular covenant by one party may be a condition precedent, so that the breach of it will dispense with the performance of the contract by the other ; and whether it is such, or is an independent covenant, is a question to be determined according to the fair intention of the parties, to be collected from the language employed by them ; but an intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed. Where mutual covenants go to the whole of the consideration on both sides, said Lord Ellenborough, in *Ritchie v. Atkinson*, 10 East, 305, they are mutual conditions, the one precedent to the other ; but when the covenants go only to a part, then a remedy lies on the covenant to recover damages for the breach of it ; but it is not a condition precedent. *Boone v. Eyre*, 1 H. Black, 273. Unless the non-performance, alleged in breach of the contract, goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages. *Davidson v. Gwynne*, 12 East, 389 ; Abb. on Ship. 342 ; 2 Smith's Lea. Cas. (ed. 1855,) 26, 27 ; *Seeger v. Duthie et al.* 8 J. Sco. N. S. 45. Accordingly, it has been held in repeated cases, that such clauses in a charter-party as " ship to proceed with all convenient speed," or " in a reasonable time," or " with all possible despatch," or the like, are not conditions precedent in such instruments, but are clearly independent stipulations, unless it appears that the alleged breach goes to the whole root and consideration of the contract. Take, for example, the case of *Clipsham v. Vertue*, 5 Ad. & E., N. S. 265, where the stipulation in the charter-party was to load, and forthwith proceed to the port of destination. Charterer refused to load ; and, upon suit being brought, pleaded to the action, that the vessel did not arrive at the port of lading until after an unreasonable delay. To that plea the plaintiff

demurred ; and the plea was held bad, because it did not show that the delay frustrated the object of the voyage. *Fothergill v. Walton*, 8 Taunt. 576. Where the charter-party contained a stipulation to proceed from one port to another "with all convenient speed" ; and the master, instead of conforming to the stipulation, wilfully deviated, causing a delay of six weeks ; and, in consequence of the deviation, the agent of the defendants refused to load the vessel. Tindall, Ch. J., left it to the jury, to determine whether the deviation deprived the freighter of the benefit of the contract. *Freeman v. Taylor*, 8 Bing. 124.

"Sail with all convenient speed," were the words of the charter-party in *Tarrabochia v. Hickie*, 1 H. & N. 183 ; and the jury found, in an action for refusing to load, that the vessel did not sail with all convenient speed ; but the court held, that the finding was no answer to the action, unless it also appeared, that the object of the voyage was wholly frustrated by the breach of the stipulation. *Hurst v. Usbone*, 18 C. B. 144. Similar views were also expressed in *Dimeck v. Corlett*, 12 Moo. P. C. 199, where the stipulation was, that the vessel, being tight, stanch, and strong, and properly manned, and every way fitted for the voyage, should, "with all convenient speed," proceed in ballast to a designated port ; and it appeared at the trial that she was not then finished, and did not get ready to sail for more than a month. It was held, that the failure to sail as stipulated was no answer to the action, without proof of other loss than that occasioned by the falling of freights. Defendants suppose that the cases, *Glaholm v. Hayes*, 2 M. & G. 257, and *Ollive v. Booker*, 1 Exch. 416, assert a different doctrine ; but that opinion does not appear to find support in the later cases. *Tarrabochia v. Hickie*, 1 H. & N. 183 ; *Seeger v. Duthie et al.*, 8 J. Scott, N. S. 45 ; *Dimeck v. Cortlett*, 12 Moo. P. C. 199. Perhaps the latest case is that of *Behn v. Burness*, 5 L. T. N. S. 207, where the stipulation was that the ship, "now in the port of Amsterdam, shall, with all possible despatch, proceed to New-port" ; and it was distinctly held that the description of the place where the vessel was supposed to be was not a warranty or condition precedent.

Both parties understood that the vessel was at sea, and that she might arrive at Melbourne and be engaged by the master before her instructions would come to hand; and they accordingly stipulated that, in that event, the charter should be void. The engagement of the ship before the instructions were received, was to render the charter void; but, in the view of the court, there is not a word in the instrument to warrant the conclusion, that the parties contemplated that any such consequence should flow from the arrival of the vessel at that port, and her temporary departure seeking business. Parties doubtless expected that the ship would proceed from Melbourne to Calcutta; but, when the provision in that behalf is compared with the one providing for the forwarding of instructions, it is evident that it was not intended as a warranty or condition precedent, as the latter is framed in the most general terms possible, clearly indicating that the parties contemplated that the instrument might reach the master at other ports than the one to which he was immediately destined. All possible despatch was required of the vessel, and the owners were required to use the most direct means to forward instructions to the master; but no provision was inserted to render the charter void, unless the master should have engaged the ship before the instructions came to hand. Support to this view of the case is derived from the fact, that no day is fixed for the departure of the vessel from Melbourne, or for her arrival at Calcutta. Unless the instructions were received by the master before the vessel sailed to seek business, it must have been understood by the defendants, that some delay would necessarily ensue in the departure of the vessel; and if, in that contingency, they had been unwilling to accept the contract, the reasonable presumption is, that they would have insisted that some more specific provision upon the subject should have been inserted in the charter-party. Provision was made to protect the plaintiffs, in case the vessel was engaged; and, as the parties appear to have understood the effect of a condition precedent, it may well be supposed, that, if they had intended that the contract should be null in case the vessel sailed from Melbourne before the master received the instructions, they would have said

so in terms as explicit as those employed in respect to the engagement of the vessel.

Nothing of the kind, however, is to be found in the instrument; and I am of the opinion that nothing of the kind was intended.

Delay ensued, beyond question, for a longer time than the parties expected when the charter-party was executed; and the remaining question is, whether it was of a character, and for such a length of time, as to justify the defendants, under the circumstances, in refusing to load the vessel. When a day is appointed for the payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing, which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied on his remedy, and did not intend to make the performance a condition precedent; and so it is, where no time is fixed for the performance of that which is the consideration or other act. 1 Wms. Saund. 319, *b*. Moral wrong is not imputed to the plaintiffs in this case, and could not be, if attempted, with any success, as the whole evidence shows that the delay of the vessel was the result of an unforeseen accident, over which the plaintiffs could exercise no control. Under those circumstances, the rule is, that the delay is no answer to the action for a refusal to load the vessel, unless it appear that the effect was to frustrate the voyage. Additional authorities to this point are unnecessary, as those already cited are full to the point. *Mill-dam Foundery v. Hovey*, 21 Pick. 439; *Stavers v. Curling*, 3 Bing. N. C. 355. Applying that rule to the present case, it is quite obvious what the result must be. Sufficient saltpetre, or its equivalent, for ballast, was to be furnished by the defendants; but their agent had not purchased any of the article when he wrote to them on the 27th of November, 1858, that he should consider himself at liberty to throw up the charter. Freight, per charter-party, was \$13 for whole packages, and half price for broken storage; but, when the defendants refused to load the vessel, the rate had fallen more than one half; which, taken in

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connection with the letter of the defendants' agent, affords strong ground to conclude that the market rate of freight had more to do with the refusal to load the vessel than any delay which had ensued on her arrival. Full confirmation of that view of the case, if any be needed, is also derived from the subsequent conduct of the agent of the defendants in chartering another vessel to take the place of the *Mary Bangs*, and loading her with the funds provided to purchase a cargo for the vessel of the plaintiffs.

In view of the whole case, I am of the opinion that the plaintiffs are entitled to recover; and, according to the agreement of the parties, an assessor must be appointed to report the amount.

MAY TERM, 1863.

THE UNITED STATES, Libellants, v. THE BRIG LILLA AND CARGO.

BARAK MAXWELL *et als.*, American Claimants to the Vessel;

RICHARD G. BUSHBY, British Claimant to the Vessel;

RICHARD G. BUSHBY *et al.*, Original Claimants to Part of the Cargo;

FRAZER, TRENHOLME, & Co., Petitioners on Appeal, and Claimants to the same Part of the Cargo.

In a prize court, where the motion for further proof was filed in the court below, and was there overruled, and the appeal taken, as well from the action of the court in that behalf, as from the decree upon the merits, *held*, that the appellate tribunal would not grant a separate hearing, upon the motion, because the appeal is an entirety, and the several questions involved in it can be most conveniently heard at the same time.

Where such motion was made and overruled in the court below, it cannot be determined whether the action of the court was correct or incorrect, without recurring to the evidence then before the court.

If the neutral owner claims a portion of the cargo, which belongs to an enemy, for the purpose of deceiving the court, the rule is that the part belonging to the neutral will be condemned, as a penalty for the fraudulent conduct; but this rule, perhaps, should only be applied in extreme cases, and where the evidence leaves no doubt of the truth of the charge, and the circumstances afford no ground of justification, palliation, or excuse.

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The universal rule is, that, before a claimant can expect an order for further proof to be made, he must be able to render it probable, that if the motion is granted, he will be able to overcome the probative force of the suspicious circumstances.

A purchase of an enemy's vessel in a neutral port, during war, is itself a suspicious circumstance; and whenever such a purchase is drawn in question, the evidence of an absolute and *bona fide* transfer ought to be clearly established.

Neutrals may purchase an enemy's ship, but such purchases are liable to great suspicion; and if full proof be not given of their validity, by bill of sale and payment of a valuable consideration, it will materially impair the validity of the neutral claim.

Evidence to acquit or condemn must come, in the first instance, from the papers of the officers and crew of a captured ship, and leave for further proof is granted in cases of honest mistake or ignorance, or to clear doubts or remedy defects, but the application must be supported by evidence of probable cause and good faith, or it will be rejected.

Prize courts will not, in general, grant an order for further proof, where it clearly appears that the party moving for the order has knowingly attempted to cover and claim an enemy's interest in the captured property, whether the purpose of the claimant was to protect his own interest, or to benefit the enemy owner.

Persons claiming to be the owners of property captured as prize, and wishing to procure the restitution of the same, must file their claim before the proper court. The master or agent may make the claim, but it must be made in behalf of the proper party; and if no claim at all be made, the presumption is that it is enemy's property, and the same must finally be condemned.

Claims presented after the proofs have been opened and examined, and after hearing the reasons assigned for the condemnation, are never favored.

THIS was a case of prize, and the case came before the court upon an appeal from a decree of the District Court. Capture was made on the 3d of July, 1862, by the United States gunboat Quaker City; and the vessel and her cargo were sent into this district for adjudication. The property captured was the brig Lilla and her cargo; and the material allegation of the libel was that the vessel and her cargo were lawful prize to the United States and to her captors. Claim for the vessel was filed July 30, 1862, by Barak Maxwell, of Wells, in the State of Maine. He intervened for his interest, and that of Richard C. Bartlett, and the Mercantile Mutual Insurance Company. His claim was for the vessel, her tackle, apparel, and furniture, and he alleged that he and the parties for whom he intervened were the true and lawful owners of the vessel. A part of her cargo was sold by agreement.

On the 2d of August, 1862, Charles Applebee appeared and also filed a claim to the brig, her tackle, apparel, and furniture, as the property of Richard G. Bushby, a British subject. According to his statement, he also was a British subject; and the alle-

gation was that he filed the claim as the master who was in command of the vessel during the voyage. Among other things, he alleged, that she was a British merchant brig, duly registered as such, and that she was wholly owned by British subjects. Allegation was also made upon information and belief, that all of the cargo, except thirty-seven packages of medicine, was owned by British subjects, residing and being in England at the time of the capture and the filing of the claim. Said packages of medicine, as alleged, belonged to a passenger, but the name of the passenger was not specified, nor did the intervenor in direct terms make any claim for that part of the cargo. Three days later, the name of the passenger was given in a test affidavit filed by the claimant, as B. D. Hewetson, and it was then represented that he was also a British subject, and that he was the owner of the thirty-seven packages of medicine. The claimant intervened as master; and the allegation was that all of the cargo, except the packages of medicine, was owned by Bushby & Co. of Liverpool; and he averred "that the parties aforesaid were the *bona fide* owners of said brig and cargo," and denied that the same were lawful prize. Proofs *in preparatorio* were duly taken, and filed in the cause, consisting of the depositions of all who were on board at the time of the capture. On the 1st of October, 1862, the proctor for the claimants of the vessel and cargo, moved the court for an order for further proof in the cause, to enable him to establish the truth of the alleged fact that R. G. Bushby was the true and lawful owner of the vessel; and that the cargo was shipped from the port of departure to be transported to Nassau, and nowhere else, and that the shippers, John Senior & Co., Bushby & Co., R. G. Bushby, I. Perrin & Co., and Henry Lafone were and always had been the *bona fide* shippers and owners of the cargo in the proportion standing in their names on the freight-lists on file; that they, the claimants, were British subjects; and that Barry D. Hewetson, also a British subject, was the owner of the several packages of medicine, and that no part of the cargo was intended to be transported to any Southern port, in violation of any blockade or belligerent right of the United States. Full hearing was had in the District

Court, and the motion for further proof was denied and overruled. Final decree was accordingly entered on the 14th of October, 1862, to the effect, that the claim of R. G. Bushby to the vessel should be dismissed, and that the claim of Barak Maxwell and others to the same should be allowed; but, inasmuch as it appeared, that the vessel had previously been taken from their possession, by the officers and crew of an armed vessel acting as a privateer, under the direction and control of the enemies of the United States, and was captured from the possession of persons claiming title under such pretence of authority, the restoration of the vessel to them was ordered, on the condition that they should pay to the captors a certain sum as salvage, and the costs and expenses of the captors incurred on account of the vessel.

A part of the cargo was found to be the property of Barry D. Hewetson, although not formally claimed by him; and in respect to that part of the claim the decree was, that it be condemned as lawful prize, upon the ground that the owner had for a long time been a resident in Charleston, S. C., which was a part of the territory of the enemies of the United States, and the property must, therefore, be deemed the property of an enemy. The residue of the cargo was claimed in behalf of R. G. Bushby and others, and was condemned by this decree. The ground of the decree was that the claimants were not the real owners of the property, but that the apparent title thereto was for the benefit of persons permanently residing in the territory of the enemies of the United States, and was simulated for the purpose of deceiving the cruisers of the United States; and also because it appeared, that the property so claimed was the property of persons permanently residing in the territory of such enemies, and consequently must be deemed to be enemies' property. Appeal was duly claimed by R. G. Bushby as owner of the vessel, and by Bushby & Co., as part-owners of the cargo.

The application for the order for further proof contains an allegation, that portions of the cargo were owned by John Senior & Co., R. G. Bushby, I. Perrin & Co., Henry Lafone, and Barry D. Hewetson; and they were also joined in the petition for an appeal. It was in evidence that the vessel was built in

Wells, in the State of Maine, and that she was owned by the American claimants; her permanent enrolment showed that she was built at that port in the year 1855, and that she was called the Betsey Ames, of Wells, and that Richard P. Bartlett, one of the American claimants, was at that time her master. The enrolment was dated on the 31st of October in that year, but on the 30th of March following, the same was surrendered at the custom-house in Boston, and cancelled, and a temporary register was taken out, in which it was certified that the vessel was bound on a foreign voyage; the owners' oath was duly taken on both these occasions, and the corresponding certificates were issued that the American claimants were the only owners of the vessel. Barak Maxwell's test affidavit affirmed the same thing, and also stated, that about the 1st of October, 1862, the vessel sailed from New York for Cuba with a lawful cargo. The evidence also tended to show that during the voyage, somewhere about the 12th of October, she was captured by an armed vessel commanded by one Henry L. Libby, acting or claiming to act under the assumed authority of the so-called Confederate States; that she was carried into Charleston, S. C., and while lying there, by proceedings in a tribunal of some kind, she was condemned and sold. John Frazer & Co., a commercial house doing business in the city of Charleston, were the purchasers. Immediately after the proceedings for condemnation, the name was changed to the Mary Wright; and under this new name, November 2, 1862, she successfully run the blockade established by the United States, still commanded by the same Henry L. Libby, and she arrived at Liverpool under the same commander, some time in the following month, where she was soon after registered as the British brig Lilla, in the name of the claimant Bushby. On the 15th of May following she sailed from Liverpool on a voyage, which was the subject of investigation in this cause.

R. H. Dana, Jr., United States District Attorney.

The title of Bushby is not shown to be *bona fide*. The *onus* is on him to show his title and neutrality. 1 Wheat. 506; *The Walsingham Packet*, 2 Rob. 77; *Rosaline and Betsey*, 2 Rob. 343; *Countess of Lauderdale*, 4 Rob. 283.

The vessel may be condemned, notwithstanding the owners have a neutral as well as an enemy domicile. *San Jose Indiano*, 2 Gall. 268; *Antonio Johanna*, 1 Wheat. 159; *The Friendship*, 4 Wheat. 105.

The fraud as to the master is attempted to be imposed upon the prize court. This is not merely a fraud as to the master, but it shows that there was reason to conceal that Libby was master. There were false bills of lading of the medicine; they were made out in Bushby's name, but Hewetson was the owner of them. This fact alone would warrant the dismissal of the claim of R. G. Bushby to the vessel. *The St. Nicholas*, 1 Wheat. 431; *The Betsey*, 2 Gall. 385; *The Graaf Bernstoff*, 3 Rob. 109; *The Eenrom*, 2 Rob. 1; *Dos Hermanos*, 2 Wheat. 76.

The purchase of an enemy's vessel in a neutral port during war is suspicious. 2 Wheat. 30 (App.); Hall's L. of W. 483; 3 Phill. Int. Law § 486; *Dree Gebroeder*, 4 Rob. 233; *The Argo*, 1 Rob. 159; *The Bernon*, 1 Rob. 102; *The Welvaart*, 1 Rob. 122.

When such a purchase is so made, the evidence of absolute and *bona fide* transfer of all interest must be clear. Retaining the former master, an enemy, in command, taking an enemy passenger, with a cargo belonging to him, and bound to an enemy's blockaded port, and making no change in the vessel or her employment, are all circumstances of grave suspicion relied on by the courts.

The claim of Bushby & Co. ought to be dismissed.

The cargo must be presumed to be enemies' property, from the fact that it was in an enemy's vessel. *The London Packet*, 5 Wheat. 132; *The Flying Fish*, 2 Gall. 374; *The Princess*, 39 Eng. L. & Eq. 590.

A fortiori, where there is an attempt to conceal the character of the vessel, where the enemy master is continued in command, his true character concealed, and where the vessel is bound on just such a voyage as an enemy charterer would have prosecuted. *The London Packet*, 1 Mas. 14.

As part of this cargo was certainly enemies' property, and bound to an enemy's port, the maxim *noscitur a sociis* applies.

One of the claimants has concealed the character of the vessel. *The Eenrom*, 2 Rob. 1; *The Graaf Bernstoff*, 3 Rob. 109; *The Betsey*, 2 Gall. 377.

If this cargo, neutral when shipped, was to become enemy's property in the event of safe arrival, it should be condemned. *The Ann Green*, 1 Gall. 289; *The Francis*, 1 Gall. 449.

The motion for further proof should be refused, because it offers no proof of facts essential to be shown, or to explain the difficulties. *The Vrouw Hermina*, 1 Rob. 163; *The St. Lawrence*, 8 Cran. 442; *The Mars*, 6 Rob. 86.

It was filed after seeing the proof, and hearing the reasons for condemnation. 3 Phill. Int. Law, § 467, and cases cited *supra*.

S. Bartlett and *C. G. Thomas*, proctors for British claimants.

The vital question as to the vessel is, whether the evidence *in preparatorio* is such as ought to induce the court, to refuse the claimant all right, to establish as against the captors, by further proof, the existence and fairness of his title, and that such title is not held in trust for enemies, on the ground of which suspected trust alone, the condemnation in the court below rested.

It is fit, at the outset, to find on what grounds the Supreme Court place the doctrine of admission or rejection of further proof, since its rules of decision have been less austere than those of some of the earlier cases in the Circuit Courts.

It is well settled, if an application for further proof be rejected in the District Court, this court can administer the proper relief. *The Pizarro*, 2 Wheat. 240.

The doctrine of the Supreme Court, in relation to further proof is best stated in the following cases: —

The Dos Hermanos, 2 Wheat. 80; where it is stated thus: "If from the whole evidence the property clearly appeared to be hostile or neutral, condemnation or acquittal immediately follows. If, on the other hand, the property appear doubtful, or the case be clouded with suspicions or inconsistencies, it then becomes a case of further proof. It is granted in cases of honest mistake or ignorance, or to clear away any doubts or defects consistent with good faith. But if the parties had been guilty of gross fraud, or misconduct, or illegality, further proof is not allowed."

In the case of *The Fortuna*, 2 Wheat. 161 ; where papers were concealed in a tin box in an old piece of timber, and where it was insisted that such fraudulent concealment was a substantial ground for condemnation, the court sustained an application for further proof.

In the case of *The Pizarro*, 2 Wheat. 228 ; where papers were thrown overboard, and where it was insisted that such spoliation of papers excluded the benefit of further proof, the court held it to be a circumstance open to explanation, and not a ground for denial of further proof.

In the case of *The Freundschaft*, 3 Wheat. 47 ; where it was contended that, in a case of cargo accompanied by mere bills of lading, but not with letter of advices or invoices, claimants ought not to be let into further proof, the court refused so to regard it, stating (p. 48) " that it is unquestionably extraordinary that the same vessel which carries the goods should not also carry invoices and letters of advice, but the inference which the counsel for the captors would draw from this fact does not seem to be warranted by it. It might induce a suspicion that papers had been thrown overboard, but in the total absence of evidence that the fact had occurred, the court would not be justified in coming positively to such a conclusion. Between London and Lisbon, where the voyage is short and the packets regular, the bills of lading and invoices might be sent by the regular conveyances.

The case of *The Atalanta*, 3 Wheat. 409, was a case where property clearly neutral was shipped on board an armed enemies' vessel, which it was contended was conclusive ground of condemnation ; but the court held that the claimant should be entitled to make further proof, although there were other facts that weighed against him, stating thus (pp. 415, 416): " In addition to the extraordinary fact of employing a belligerent carrier, while a neutral vessel belonging to the alleged owner of the cargo lay in port, there are circumstances in this case calculated to awaken suspicion, which the claimant ought to clear up so far as may be in his power."

Was this case when heard by the district judge, and before the application for further proof, one where the property " clearly

appeared to be hostile," or was it a case where "since the property appeared doubtful, and the case clouded by suspicions or inconsistencies, it then became a case of further proof"; and if it fell within the latter category, had the claimant "been guilty of gross fraud or misconduct," which upon settled principles shut him off from further proof?

If parties, through misapprehension, have not been represented in the case, they may file their case even after it has reached the Supreme Court. *The Harrison*, 1 Wheat. 298.

Barak Maxwell, in presenting only a register of enrolment of the vessel, does not show even *prima facie* evidence of title. The title of Maxwell must be proved in the ordinary way in which title is established. The rules of proof in prize cases do not permit property to be delivered to any party who shall make a claim to it supported by his test affidavit or oath; even in uncontested cases, no court of admiralty would deliver up a vessel to a party under such slender proof of title. *The London Packet*, 2 Wheat. 371.

F. C. Loring, proctor for Maxwell and American claimants.

By the decree of the District Court, this vessel was ordered to be restored to these claimants, its former owners, on payment of a certain sum as salvage to the officers and crew of the Quaker City, and costs.

From this decree neither the libellants nor these claimants have appealed; consequently, so far as the libellants are concerned, they cannot now contest the right of these claimants to restitution, nor ask a larger amount of salvage than that awarded by the District Court.

The claimants are equally concluded by its decree, and cannot now insist that no salvage or a smaller amount should be awarded. *The Mary Ford*, 3 Dall. 188; *Stratton v. Jarvis*, 8 Pet. 4.

The American claimants are bound to show their original title and ownership; it is proved by the test affidavit of Barak Maxwell, and the shown identity of the Lilla with the Mary Wright and the Betsey Ames.

The Confederate cruiser had no right by the law of nations to

make captures. She was a private-armed vessel. Chit. L. Nations, 73; *The Estrella*, 4 Wheat. 298.

Until the government of the United States shall recognize the Confederate States as an independent power, its courts cannot do so. That is a political, and not a judicial question, over which courts of law have no jurisdiction. *Rose v. Himely*, 4 Cran. 241; *United States v. Palmer*, 3 Wheat. 610; *The Nueva Anna*, 6 Wheat. 193; *Judge Sprague's Charge*, 24 Law Rep. 17.

The British claimants' title depends not only upon the legality of the capture, but of the proceedings and sentence of condemnation.

There were no such judicial proceedings for condemnation of the vessel as this court could recognize. *Rose v. Himely*, 4 Cran. 241.

Consequently, the ownership of the American claimants was not disturbed by the alleged capture or condemnation.

The facts of the case tend to show that Bushby was a colorable, and not a real purchaser of the vessel.

There is necessity of condemnation to change title. *The Flad Oyen*, 1 Rob. 135; *The Kierlighett*, 3 Rob. 97; *Goss v. Withers*, 2 Burr. 683; *Asseviedo v. Cambridge*, 10 Mod. 77; Chit. Law of Nations, 99, 100; Halleck's Law of Nations, 728.

CLIFFORD, J. The petition or motion for appeal is signed by the proctor of the claimants, and the only entry under it in the transcript is, that "the court allowed an appeal accordingly," which is, to say the least of it, exceedingly indefinite, and not very satisfactory.

Strong doubts are entertained whether any of the parties named, except R. G. Bushby and Bushby & Co., had any right to appeal; but as no motion to dismiss is presented, the court will briefly examine the whole case.

The parties appealed from the refusal of the court to grant the motion for an order for further proof, as well as from the decree dismissing the claim to the vessel, and condemning the cargo as lawful prize. The appellants hardly contend that the decree of the District Court was incorrect upon the proofs there exhib-

ited, but they insist that the court plainly erred in overruling the motion for an order for further proof.

Prize courts of original jurisdiction usually, and almost necessarily, hear the cause in the first instance upon the proofs taken in *preparatorio*, and then decide upon that evidence, whether or not it is proper to allow such a motion if one be filed. Where the motion was filed in the court below and was there overruled, and the appeal is taken, as well from the action of the court in that behalf, as from the decree upon the merits, the appellate tribunal will seldom or never grant a separate hearing upon the motion, because the appeal is an entirety, and the several questions involved in it can be most conveniently and appropriately heard at the same time.

Such motions may also be originally made in the appellate court, and where they are so made, the hearing upon the question of granting the same may in the same manner be deferred, and the motion heard with the merits ; or in special cases, where, upon opening the record, it appears that the application for leave may conveniently and safely be heard and determined, without a full examination of the entire merits ; or where it clearly appears that delay will be prevented and justice promoted, the court will hear the application as a preliminary motion in the cause, and grant or refuse it as the circumstances of the case may require. The present case is one where the motion was filed and overruled in the court below, and of course it is one where it cannot be determined whether the action of the court was correct or incorrect, without recurring to the evidence then before the court. The original owners of the vessel insist, in the first place, that the British claimant is a mere nominal purchaser ; that the beneficial interest, if any was acquired under the pretended condemnation and sale, is still in the purchasers at that sale, and that if the claimant took or now holds the legal title, it was and is, only as trustee for the equitable owners, who in truth and fact were and continue to be enemies of the United States. Secondly, they contend that even if the British claimant was an actual purchaser for value, still that their claim as original owners of the vessel must prevail, because the evidence shows that the primary

title held by them has never been diverted. The last proposition is chiefly one of law, but the first presents a mixed question of law and fact, and of course must depend in a great measure upon the evidence. The theory of the British claimant is that he is the *bona fide* owner of the vessel, under a purchase for value, in an open market, from one holding the legal title; and that the voyage was in fact, as described in the ship's papers, a voyage from Liverpool to Nassau and back, and nowhere else; and that the cargo was neutral property, destined unconditionally and without any reserve, for the Nassau market, as a lawful traffic between two neutral ports. Assuming the facts to be so, then it is clear that the owners of the cargo had nothing to conceal, and it may be, that in the proper application of those liberal principles which ought always to prevail in favor of neutral rights, that the claim to the vessel, if the purchaser had no knowledge or notice actual or constructive, of the infirmity of the title, is one which a prize court ought to respect and protect; but in the view taken of the case, it will not be necessary to decide or even to examine that question at the present time, for the reason, that it is obvious that unless all the conditions, mentioned as applicable to the claim for the vessel, substantially concur, the view of the claimant upon that branch of the controversy cannot be sustained. The ship's papers represent that Charles Applebee was the master for the voyage, and he appeared in the case as such, and preferred the claim both to the vessel and to the cargo, and the only one that has been filed, except that presented by the original owners of the vessel. When interrogated as a witness in the preparatory examination, he testified that R. G. Bushby owned the vessel as he supposed, and that the supposed owner appointed him master. The evidence shows that he acted as master in loading the vessel, in shipping the crew, in signing the ship's papers, and in navigating the vessel out of the harbor of the port of departure. The sixteenth answer of the witness was to the effect that he had no acquaintance with any of the shippers, and knew nothing as to the ownership of the cargo. Subsequently, however, he stated that the medicines belonged to a passenger, and that Mr. Libby was

a passenger, but that he (Libby) had no interest in the vessel or cargo.

Hearing was had upon the evidence taken *in preparatorio* before the motion for an order for further proof was filed.

Accompanying that motion is an affidavit signed by the witness, which was filed at the same time with the motion. He there states that before he sailed he knew nothing of Henry Libby, except that he was introduced to him by the claimant of the brig, to go as a passenger in the vessel to Nassau, but he admits that after the vessel got to sea, he learned by his conversation that the supposed passenger commanded the vessel on the outward passage. Captors insisted at the hearing that Henry S. Libby was in point of fact the master of the vessel for the voyage. Witnesses examined *in preparatorio* so testified, and their depositions were duly filed in the cause. Special reference is made to the deposition of the acting mate as establishing that fact. He testified that Henry S. Libby acted as master, working the ship and giving the courses from the time they left Liverpool, until they sighted the Quaker City; and he also stated that he heard the affiant say, that he was to act as mate until they got to Nassau, and that Libby was then to leave, and that he was to take the vessel back to the port of departure. Libby, as the witness states, was really "my skipper on the voyage, and Applebee and I stood watches like first and second mates." An attempt was made by the affiant, when he gave his affidavit in support of the motion for an order for further proof, to break the force of that testimony, but the attempted explanation is not satisfactory. He admits that he stood watch on the voyage, but alleges that he had done so for many years, when he had no second mate, and was in the command of a small vessel. The interference of Libby in the command of the vessel is admitted, but he alleges that it was the controversy growing out of that interference that induced him to make the entry on the log-slate. The presumption from the whole evidence is irresistible that Henry S. Libby, who had first captured the vessel, and then successfully employed her in running the blockade, and finally navigated her to the port of Liverpool, was in point of fact the actual master on the return

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voyage. The clearance was doubtless facilitated, and perhaps inquiry silenced, by putting forward the mate as the ostensible master ; and it is equally probable that the arrangement contemplated that he was to resume the position as master, whenever it should become necessary for him to do so, as a means of deceiving the cruisers of the United States, in case any attempt should be made to board the vessel. The claimant of the vessel knew Henry S. Libby, and the clear inference from all the evidence is that he was connusant of the whole arrangement. All of the cargo as represented in the claim was the property of Bushby & Co., except thirty-seven packages of medicines, and those it was stated belonged to a passenger. The preparatory proofs showed that the name of that passenger was Barry D. Hewetson ; and the bills of lading show, that all the medicines and other goods constituting his adventure, were shipped in the name of the claimant of the vessel. The bill of lading is made to order or to assigns, but it is not indorsed, nor was the shipment accompanied by any instructions. The owner of that part of the cargo, although a British subject, is shown beyond peradventure to have been a permanent resident in the city of Charleston, and to have been in the vessel during the outward voyage, both when she ran the blockade, and when she arrived at the port of destination. His own testimony shows that he owned the merchandise, and that he shipped the same for the shop of his son-in-law, also a permanent resident in Charleston, and doing business there as a druggist ; and he expressly stated that he was "interested with him" in the trade or business. The application for the order for further proof alleges, that the party named was the *bona fide* owner of the goods, and that no part of the cargo was intended for a Southern port ; but the proctor presenting it offers no evidence to prove the allegations, except the affidavit of the owner and shipper of the merchandise. Studied effort is made by him to qualify the testimony he gave before the commissioners, but the explanations are not of a character to obviate the force and effect of his former statements. Insufficient and unsatisfactory as they are, however, still they deserve, and should receive, a brief notice. Respecting the relations between him and his son-in-law in regard

to the packages of medicines, he says that he did not mean to testify that he was interested with him in the profits of his store, but only that he was interested with him as being his son-in-law, which is a distinction, as it seems to the court, more ingenious than credible. The witness stated before the commissioners that he had his own bills of lading in his trunk, but he did not produce anything of the kind. Failing to exhibit them, the commissioners showed him the one found on board the vessel, and he admitted that the two sets of initials appearing in the margin of the paper were his own, and those of the firm of his son-in-law, but he stated that he did not know the claimant of the vessel, or how the bills of lading came to be made in his name, or to his order. The explanation upon that subject, if such it may be called, is, that he received his bills of lading from the ostensible master, and he repeats in his affidavit that he has them in his possession, and is ready to exhibit them to the court; but they have never been produced.

Taken as a whole, the evidence on this branch of the case shows that the party owning the medicines was domiciliated in the enemy's country; that he had a permanent residence there, and that he purchased and shipped the property intending to transmit it there, and that he was in the act of so doing when the capture was made. The conclusion, therefore, is inevitable, that the name of the claimant of the vessel was used to cover enemies' property, and, unlike the owner of the thirty-seven packages of medicine, he does not even offer the excuse that he was ignorant of the transaction. Where the neutral owner claims another part of the cargo which belongs to an enemy, for the purpose of deceiving the court, the rule is as laid down by the Supreme Court, in the case of *The St. Nicholas*, 1 Wheat. 417, that the part belonging to the neutral will be condemned as a penalty for the fraudulent conduct. Doubts are entertained whether that rule ought to be applied except in extreme cases, where the evidence leaves no doubt of the truth of the charge, and the circumstances afford no ground of justification, palliation, or excuse. But the case under consideration presents no necessity for the decision of that question, as the evidence upon

that subject must be taken in connection with the undeniable proof of deception practised as to the master, and the whole list of subterfuges, cropping out in every part of the transaction, from the date of the register of the vessel, to the time of her capture. Freight was not paid to the claimant of the vessel by the owner of the medicines, and he carefully omits to state to whom he paid it. If he is to be believed, he paid it in advance, but to whom he paid it he does not state. His language is, "the freight was paid in advance, they would not take it on any other terms," but the names of the persons to whom the payment was made do not appear. The evidence shows that he applied to Frazer, Trenholme, & Co. for his passage and for transportation of the medicines, and they finally directed him to send the same to the Lilla, and he obeyed their instructions. They had to inquire, however, of another "gentleman" before they could decide to take the freight, but the case is silent as to the name of the person of whom the inquiries were made. What relation Frazer, Trenholme, & Co. bear to John Frazer & Co. does not directly appear, and the claimants offer no explanation upon the subject. The outward cargo was consigned by the one of those parties to the other; and the witness Henry S. Libby states that the former were the agents of the Charleston house, and they still appeared as the managing owners of the vessel after the pretended sale to the present claimant.

Subterfuge and fraud, as to the bills of lading, and as to the master, are not the only imputations of the kind which are justified by the evidence. On the contrary, the deception as to the master is carried out in all the official papers, connected with the manning, victualling, loading, clearing, and sailing of the vessel, and the same subterfuges and misrepresentation are adopted in the claim and attempted to be imposed upon the court. Many other circumstances might also be adverted to, as tending to establish the same conclusion. The ostensible master was directed to report himself to a certain commercial house at Nassau, and to confer with them as to the disposition of the cargo, but the same brief letter also states that instructions were to follow by mail, showing conclusively that the letter was not regarded as the let-

ter of instructions. Just enough was written to apprise the persons to whom the communication was addressed, that secret instructions were forthcoming, and to make it useful to the ostensible master, in case he found it necessary to use it as a means to elude capture in the course of the voyage. *The Flying Fish*, 2 Gall. 375.

The motion for the order requested and refused, is supported by the affidavit of the proctor, and by the affidavits of the ostensible master, and the owner and shipper of the medicines, and of George D. Harris, one of the firm to whom the before-mentioned letter was addressed. The vessel on her voyage from Charleston to Liverpool was consigned to Frazer, Trenholme, & Co., and that commercial house, or one of the partners, acted as the agents of John Frazer & Co. in the pretended sale to the claimant. The shipping articles also show that the Liverpool house are still the managing owners of the vessel, and the evidence also shows, that they paid the advance wages of the seamen, and that the return list of the crew was without date and directed to their firm. None of these matters are explained or proposed to be explained, in any other way than by the suggestion that they are not necessarily conclusive. The answer to that suggestion is, that the burden is upon the claimant to explain the suspicious parts of the transaction. The universal rule is that before a claimant can expect an order for further proof to be made, he must be able to render it probable that if the motion is granted, he will be able to overcome the probative force of the suspicious circumstances. The affidavits accompanying the motion do not constitute a compliance with that rule. As a whole, they are sufficient in form, but they are wanting in substance. They affirm that the vessel was regularly documented to the claimant, and that she was really bound to Nassau, and not to any Southern port, but they do not show that the claimant paid value for the vessel, or that he held the title as his own absolutely, and not in trust for enemies of the United States.

No attempt is made to explain why two masters were on board, nor the deception, as to the one who in fact had the com-

mand, and no effort is made to explain the suspicions arising out of the character of the official papers. Direct testimony is also exhibited in the record which requires explanation. The deponent, Gleason, testifies, that Frazer, Trenholme, & Co., of Liverpool and Charleston, owned the vessel and her cargo when she was taken by the Quaker City, and that the two houses have the same name in each of those places, and that they owned her before she sailed on the outward voyage. The same witness also testifies, that he heard Henry S. Libby say that the cargo was to have been carried from Nassau to Charleston in the steamer Scotia, which was to follow the Lilla to Nassau, and there to take the cargo, and the informant of the witness, on board for Charleston. The argument is that the witness is not entitled to credit, but where there is such a cloud of suspicion hanging over a transaction, such suggestions are not alone sufficient answer to the imputations.

The purchase of an enemies' vessel in a neutral port during war, and while active hostilities are waging, is itself a suspicious circumstance, and whenever such a purchase is drawn in question, the evidence of an absolute and *bona fide* transfer ought to be clearly established. Neutrals may purchase an enemy ship, but such purchases are liable to great suspicion, and if good proof be not given of their validity, by bill of sale and payment of a valuable consideration, it will materially impair the validity of the neutral claim. 2 Wheat. 30 (App.); Wheat. Int. Law, by Lawrence, 972; *The Bernon*, 1 Rob. 102; *Dree Gebroeders*, 4 Rob. 232.

Further proof, says Mr. Phillimore, is never allowed to the claimants where fraudulent papers have been used, where there has been a spoliation of papers, where there has been a fraudulent covering or suppression of an enemies' interest, where there is a false destination and false papers, nor, in general, where the case appears incapable of fair explanation, or where there has been gross prevarication, or an attempt to impose spurious claims upon the court, or such want of good faith as shows that the parties cannot safely be trusted with such an order. *The Welvaart*, 1 Rob. 122; *The Rising Sun*, 2 Rob. 104; *The Graaf*

Bernstoff, 3 Rob. 109; *The Nancy*, 3 Rob. 122; *The Vrouw Hermina*, 1 Rob. 163.

Evidence to acquit or condemn, must come in the first instance from the papers and officers and crew of the captured ship. The captors are to bring the ship's papers into the registry of the District Court, in order that the principal officers and seamen of the captured ship may be examined, and their examinations reduced to writing under the rules of the court. The cause is to be heard, in the first instance, upon those papers and the depositions so taken; and if it clearly appear that the property is that of an enemy, or neutral, condemnation or restitution immediately follows; or if it appear that the character of the property is doubtful or the case suspicious, the order for further proof may be granted, according to the rules which govern the legal discretion of the court, but further proof will not be allowed if it appear that the claimants have been guilty of gross fraud or misconduct or illegality. Leave for further proof is granted in cases of honest mistake or ignorance, or to clear away doubts or defects, but the application for it must be supported by evidence of probable cause and good faith, or it will be rejected. *The Dos Hermanos*, 2 Wheat. 76.

Such is the substance of certain general rules laid down by the Supreme Court, to which it may be added, that prize courts will not in general grant an order for further proof where it clearly appears that the party moving the order has knowingly attempted to cover and claim an enemy's interest in the captured property, whether the purpose of the claim was to promote his own interest or to benefit the enemy owner. *The Betsy*, 2 Gall. 377.

Applying these rules to the present case, I am of the opinion that the motion for the order for further proof was properly overruled, and that the decree of the District Court directing the vessel to be restored to the American claimants was correct.

Neither the libellants nor the American claimants appealed, and of course the allowance for salvage must remain unchanged. An appeal was also regularly taken by R. G. Bushby & Co., as claimants of all the cargo, except the thirty-seven packages of

medicine. The documents found on board the vessel, tending to show the ownership of the cargo, are the bills of lading and freight-list.

Two parcels of saltpetre, one of seven hundred and two bags, and the other of six hundred and thirty-four bags, were shipped in the name of the claimant, and the bills of lading purport to have been consigned to order. The bills of lading were found for each of the two parcels of saltpetre, and they contain the firm name of Bushby & Co. as the shippers of that part of the cargo, and it appears that at some time they had been indorsed, but the indorsement is erased by a line drawn through it. The freight-lists and bills of lading also show that John Senior and Co., R. G. Bushby, J. Perrin & Co., and Henry Lafone were shippers of certain portions of the cargo, and there is no evidence whatever which in any manner tends to show that the claimants owned, or pretended to own, those portions of the cargo, except the unsupported statement of the claim.

The affidavit of the proctor states that the other shippers, naming them, have ever been and still are the *bona fide* shippers and owners of the several portions of the cargo standing in the freight-list on file. Gross error or wilful falsity is stamped upon all that part of the claim. Even the proctor does not pretend that any of the other shippers, except Barry D. Hewetson, have ever filed any claim, or attempted to furnish any evidence to show that the merchandise ought to be returned. Persons claiming to be owners of property captured as prize, and wishing to procure the restitution of the same, must file their claim for such property before the proper court. The master or agent may make the claim, but it must be made in the name of the proper party; and if no claim at all be made, the presumption is that it is enemy property, and the same must finally be condemned. 3 Phill. Int. Law, § 466, p. 442; 1 Wheat. 499, note.

The enemy proprietor is necessarily absent by operation of law, and yet the sentence is completely valid, as well against him as against all the world. *The Falcon*, 6 Rob. 199.

Nine of the bills of lading are in favor of the shippers, who, it is conceded, have made no claim, and there yet is as much

reason to suppose that they were owners, as that the claimants owned the goods shipped in their name. Some of the bills of lading were indorsed in blank and others were not, but it does not appear to whom any of them were consigned. The other shippers make no claim, and no attempt is made to procure their testimony or to furnish any explanation upon the subject. Four of the bills of lading were in favor of R. G. Bushby, the claimant of the vessel, and yet he says he owned no part of the cargo, and that he acted only as ship-owner. He it is who wrote the only letter that accompanied the cargo, and now he disclaims all interest in the adventure, except as ship-owner. The claimants, or one of their firm introduced Henry S. Libby to the ostensible master, and must have had full knowledge of all the principal circumstances attending the manning, loading, victualling, and sailing of the vessel. All of these circumstances have been very carefully considered in determining upon the validity of the claim to the vessel, and the remarks there made upon the evidence need not be repeated. An order for further proof in respect to the cargo was also moved by these claimants, but it is very clear that it was properly overruled. The proposition in effect now is, to show that the claim as originally made is not true; that large portions of the cargo were owned, not by the claimants, but by other persons, who have never made any claim or taken any steps to show that the capture was unlawful. The suspicious circumstances tending to implicate the owners of the cargo are not explained or attempted to be explained, and without such explanation there is no pretence that the motion ought to be granted. The examination of the case thus far has been confined to the questions involved in the appeal, and the result is that there is no error in the record. Since the appeal, however, a new claim has been presented in this court, and the motion is, to allow the petitioners to take further testimony to support the claim. The new claim is in behalf of Fraser, Trenholme, & Co., and it is presented by her Britannic Majesty's consul. Through him, the parties named move for the order, for further proof in the cause to enable them, among other things, to show that the goods and merchandise described in the prior claim to the cargo belonged to them, and

that the same were shipped by the prior claimants as their agents. Nothing of the kind was suggested in the prior claim, although it is signed by the ostensible master, who must have been well known to the managing owners of the vessel. They do not sign the claim, and it is not accompanied by any test affidavit signed by them. The libel was filed on the 14th of July, 1862, but the new claim was not presented until the 5th of June of the present year. In the mean time the cause had been heard, determined, appealed, and the opinion of the district judge delivered, published, and circulated.

The cause was heard, not only upon its merits, but also upon motions for an order for further proof, both in respect to the vessel and the cargo. The parties preferring this claim were silent throughout all that period, and they admit that the prior claimants were their agents in shipping the goods and merchandise, and they do not in terms deny that they were their agents in presenting and prosecuting the claim. Unless it can be held that the new claim is one in aid of the prior claim, and consistent with it, the general rule is that it must be rejected as an attempt after the decree of the prize court to contradict the claim upon which the decision was founded. On the other hand, if it be regarded as a claim in aid of the prior one, and consistent with it, then it is wholly unnecessary, and should be rejected as an unusual proceeding.

Agents may present a claim as well as principals, and as the prior claimants were the agents of the petitioners in shipping the goods and merchandise, it is no more than a reasonable presumption, considering the long delay and the facilities for obtaining information, that they were also their agents in prosecuting the claim in the lower court, and in taking the appeal. The rights of all parties would have been concluded if no appeal had been taken, and that was taken by the prior claimants, and of course the petitioners must approve their action in that behalf, else they could have no standing in court. Full proof is exhibited in the cause that the petitioners had knowledge of this enterprise from its commencement. They were the consignees of the vessel on her voyage from Charleston to Liverpool, and they were the

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agents of John Frazer & Co. in the pretended sale of the vessel. Had the matter stopped there, the present application might have had some foundation, but it does not stop there, because the proof is undeniable that they were the managing owners of the vessel for the voyage, and at the time she was captured. Claims presented after the proofs have been opened and examined, and after hearing the reasons assigned for the condemnation, are never to be favored, and under the circumstances of this case the claim cannot be allowed.

The motion for an order for further proof is overruled, and the decree of the District Court condemning the cargo as lawful prize, is affirmed with costs.

EDWARD MURRAY v. WILLIAM R. LOVEJOY *et al.*

An attaching creditor, by giving a bond of indemnity to the sheriff, and ordering him to sell the attached property, thereby ratifies the act of his attorney in directing such attachment, and becomes liable as a trespasser to the owner of the property so attached, if the same is not the property of the debtor; and if such creditor is notified of a suit pending against the sheriff for such property, and appears and assumes the defence of the suit, the judgment rendered therein is conclusive in another suit against him for the same trespass.

Judgment against the sheriff without satisfaction, is not a bar to a subsequent suit against the attaching creditor.

Partial satisfaction by the sheriff of the judgment against him, is not an obstacle to a subsequent suit against the attaching creditor, but will go in reduction of the damages.

THIS was an action of trespass, and the case came before the court upon an agreed statement of facts. On May 16, 1857, the present defendants, in a certain suit wherein they were plaintiffs, and one O. H. Pratt was defendant, attached certain personal property as the property of the defendant in that suit. According to the agreed statement, the suit was commenced in the District Court for the county of Dubuque, Iowa, and the writ of attachment was served and the attachment made by the sheriff of that county, but the case showed that in serving the writ and making the attachment, he acted by the directions of the attorneys of the plaintiffs in the suit; that they, the attorneys, gave

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him a bond of indemnity, conditioned that the plaintiffs should pay all damages he might sustain by reason of his making the attachment, and stipulating to save him harmless in the premises, and that the plaintiffs ratified their doings in giving the bond. The agreed statement also showed that the plaintiffs in that suit recovered judgment, and that the property so attached was sold under the process of the plaintiffs and by the direction of their attorneys. The property so attached and sold was claimed by the plaintiff in this suit, and he, on the 30th of May, 1857, brought an action for trespass against the sheriff who had thus attached and sold the property. Due notice was given by the sheriff to the attorneys who brought the suit, in which the attachment was made, to appear and defend the trespass suit, and the present defendants employed counsel and defended the suit. Trial was had, and on the 20th of October, 1859, judgment was rendered against the sheriff for the sum of \$6,233.03 damages, and costs of suit, taxed at \$77.55. No execution ever issued upon the judgment, but the case showed that the sheriff satisfied the judgment against him, in part, to wit, for the sum of \$830, out of the proceeds of the attached property. The present defendants employed the counsel to defend the suit, and had entire control of the defence, and they paid all the counsel fees, except \$100, which was paid by the sheriff out of the attached property, both of the payments made by the sheriff out of the proceeds of the attached property having been made prior to the commencement of this suit. On the 20th of April, 1860, the present defendants paid the sheriff \$1,000, and on the same day he surrendered the bond of indemnity to their attorneys; but the admission to that effect was accompanied by a denial on the part of the plaintiff in this suit, that the surrender so made was rightful, and also that at the date of this suit, the bond was in the possession of the attorneys to whom it was delivered. The writ was dated on the 1st of October, 1860, and it was agreed that if the court should be of opinion that the suit could not be maintained against the defendants by reason of the judgment against the sheriff, and by reason of having received past satisfaction by him, then judgment was to

be entered for defendants; otherwise the case was to stand for trial, unless the court were of opinion that the defendants, upon the foregoing facts, were estopped from further defence in this action, in which event the court was to enter such judgment as it should deem proper.

Brooks and Bell, for plaintiff.

Torts are joint as well as several, and a party can maintain an action against all the tort feors or against each one separately. *Baker v. Lovett*, 6 Mass. 80; *Smith v. Rines*, 2 Sumn. 347. If this be true, all the legal consequences must follow, and the injured party may have the right to pursue each tort feor to judgment and execution.

A judgment against one tort feor is no bar to a suit against another, unless full satisfaction of the judgment has been obtained. *Morgan v. Chester*, 4 Conn. 387; *Hyde v. Noble*, 13 N. H. 501; *Hepburn v. Sewall*, 5 Har. & Johns. 211; *Calkins v. Allerton*, 3 Barb. 173; *Curtis v. Groat*, 6 Johns. 168; 1 Greenl. Ev. § 533; 2 Kent's Com. 388, 389.

All the case finds is, that judgment was obtained by the plaintiff against the attaching officer, but no execution issued, and the officer paid a small sum on the judgment. *Simonds v. Center*, 6 Mass. 18; *Ward v. Johnson*, 13 Mass. 150; *Drake v. Mitchell*, 3 East, 258.

A verdict and judgment against the attaching officer are conclusive upon the defendants; the sheriff was their agent. He notified them to defend the suit against them; they were the real parties in interest. Privies as well as parties are concluded by a judgment. 1 Greenl. Ev. § 523; *Smith v. Kernochen*, 7 How. 209–216; *Glass v. Nichols*, 35 Me. 328; *Castle v. Noyes*, 14 N. Y. 329; *Eaton v. Cooper*, 29 Vt. 444; *Peterson v. Lothrop*, 34 Penn. 228; *Hancock v. Welsh*, 1 Stark, 347; *Farnsworth v. Arnold*, 3 Sneed, 252; *Griffin v. Reynold*, 17 How. 609; *Carpenter v. Pier*, 30 Vt. 88; *State of Ohio v. Colerick*, 30 Ohio, 487; *Kent v. Hudson R. R. Co.*, 22 Barb. 278; *Bates v. Stanton*, 1 Duer, 79; *Calhoun v. Dunning*, 4 Dall. 120; *Atkinson v. Purdy*, Crabbe, 555; *Sevey v. Chick*, 13 Me. 141; *Landfear v.*

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Simmons, 17 Mass. 112; *Kip v. Brigham*, 6 Johns. 158; *Stephens v. Hughes*, 31 Penn. 381.

Henry C. Hutchins, for defendants.

The recovery of judgment by the plaintiff in Iowa against the officer who served defendant's process, for the same trespass for which he now sues the defendants, bars the plaintiff from maintaining this action against the defendants. *White v. Philbrick*, 5 Me. 147; *Campbell v. Phelps*, 1 Pick. 62; *Alexander v. Taylor*, 4 Denio, 302; *Fox v. Northern Liberties*, 3 W. & S. 103; *Davis v. Scott*, 1 Blackf. 169; *Allen v. Wheatley*, 3 Blackf. 332; *United States v. Cushman*, 2 Sumn. 426, 434, 441; *Trafton v. United States*, 3 Story, 646; 2 Kent's Com. 389; *Ward v. Johnson*, 13 Mass. 148; 1 Greenl. Ev. (3d ed.) § 533, note 3; Addison on Torts, 750, 753; 2 Hillard on Torts, 329, 330; *Buckland v. Johnson*, 15 C. B. 161; *King v. Hoare*, 13 M. & W. 504, 506; *Lechmere v. Fletcher*, 1 C. & M. 623; *Bird v. Randall*, 3 Burr, 1345.

In *White v. Philbrick*, it was held that recovery of judgment and issue of execution would bar a second suit.

But if the court shall be of opinion that a party may sue and recover separate judgments against co-trespassers, then we say that the recovery of judgment against the officer and the receipt of partial satisfaction of that judgment by the plaintiff, will operate as a bar to this suit. *Thomas v. Rumsey*, 6 Johns. 26; *Livingston v. Bishop*, 1 Johns. 290; *Page v. Freeman*, 19 Miss. 421; *Knott v. Cunningham*, 2 Sneed, 204; *Fox v. Northern Liberties*, 3 W. & S. 103.

To accept partial satisfaction of one judgment is an election, and after that he is not at liberty to commence a new suit for the original trespass. The original trespass does not remain as it was, it has been partially satisfied. The original state of things has been changed, and by the act of the plaintiff. If the party may take a small part, why not take the whole?

How can the court proceed now to try the original trespass when it has been partially settled for? How would the court proceed at the trial? What becomes of the \$800 payment? Must it not be credited in some way, and if so, how? The plain-

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tiff is seeking to recover full damages for a wrong partially redeemed, and if permitted will lead to double satisfaction. *Fox v. Northern Liberties*, 3 W. & S. 103.

The fact that payment was made by the sheriff from the proceeds of the goods sold can make no difference as to its effect. It was received as a payment and must operate as a payment. The money used had no ear-mark, and the payment cannot be recalled, and the money was not paid with the assent or knowledge of the defendant.

The defendants are not estopped to defend this suit because the plaintiff recovered judgment against the officer, or because the defendants took part in the defence. If the officer had sued defendants upon their bond of indemnity against that suit, and upon notice or otherwise the defendants had defended the suit, then, perhaps, the defendants, as between them and the officer, would have been concluded by the judgment. But that is not the question here. The question is whether one trespasser is concluded from defending a suit against himself because a judgment has been recovered against a co-trespasser.

The defendants were neither parties nor privies to the plaintiff's judgment against the sheriff. *Sprague v. Waite*, 19 Pick. 455; 1 Greenl. Ev. § 535; *Kinnersley v. Orpe*, 2 Doug. 517; *Alexander v. Taylor*, 4 Denio, 302.

CLIFFORD, J. Practical questions, like those presented in this record, ought not now to be the subject of dispute or doubt, but it must be admitted, that in respect to most or all of them, it would not be difficult to present authorities of an entirely contradictory character. Certain general principles, however, which are applicable to the case may be regarded as settled; and among the number is the rule, that the attachment and sale of the property of a third person, under the circumstances disclosed in the agreed statement, is tortious, as against the person whose property is so taken and converted, and renders the sheriff liable to the plaintiff therefor, as a wrongdoer.

Doubt cannot be entertained upon the subject, and it is equally clear that the present defendants rendered themselves also liable to the plaintiff as wrongdoers, by subsequently ratifying the

directions given by their attorneys, and by approving what they had done, in giving the bond of indemnity. Indemnification itself must be regarded as a ratification of the attachment, and as the cause of the subsequent sale; and the well-settled rule is, that all persons who direct, or request another to commit a trespass, are liable as co-trespassers, if their directions or request are obeyed and followed. *Herring v. Hoppock*, 15 N. Y. 409; *Castle v. Bullard*, 23 How. 185. Where the attachment is made by the directions of the plaintiff, he is as much liable as the sheriff making it; and after conversion, the injured party may sue both or each one separately, as in other cases of joint and several liability. More than half a century ago, Parsons, C. J. held, in *Baker v. Lovett*, 6 Mass. 80, that where a trespass had been committed by several persons jointly, the party injured might sue any or all the trespassers, but he could have but one satisfaction for the same injury. Nothing is more clear, said Judge Story, in *Smith v. Rines et al.*, 2 Sumn. 348, than the right of the plaintiff to bring an action of trespass, or trespass on the case, against all the wrongdoers, or against any one or more of them at his election. Undoubtedly, the injured party may proceed against all the wrongdoers, jointly, or he may sue them all or any one of them separately; but if he sues them all jointly, and has judgment, he cannot afterwards sue any one of them separately; or if he sues one separately, and has judgment, he cannot afterwards sue them all in a joint action, because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy; but it is no bar to a suit for the same trespass against any one or more of the other co-trespassers. Cases may be found, and have been cited at the bar, which assert a different rule, and which decide, that, where separate actions are commenced against several tort feorsors for the same act of trespass, the pendency of the first suit may be pleaded in abatement of all the rest; but the doctrine, as was well said by Prentiss, J., in *Sanderson v. Caldwell*, 2 Aiken, 201, is opposed to the principle, which runs through all the authorities, that a separate trespass attaches to each of the parties individually, and which asserts that the plaintiff may sue all or any of them, or

bring separate suits against each, at his election. *Heydon's Case*, 11 Co. 5; *Mitchell v. Tarbutt*, 5 T. R. 649; *Thomas v. Rumsey*, 6 Johns. 30; *Livingston v. Bishop et al.*, 1 Johns. 290; *Brooke*, Abt. Judgment, Pl. 98; *Cocke v. Jennor*, Hobart's R. 66; *Corbet v. Barnes*, W. Jones, 377; *Bird v. Randall*, 3 Burr. 1845. Much discussion, says Mr. Greenleaf, has taken place as to the effect of a former recovery, in cases where different actions of tort have successively been brought in regard to the same chattel; as, for example, where an action of trover is brought after a judgment in trespass. Great diversity of opinion, he says, has existed, whether a plaintiff, after having recovered judgment in trespass without satisfaction, is thereby barred from subsequently maintaining trover, against another person for the same goods. Decided cases, asserting the negative, assume that the recovery of the judgment, in trespass, for the full value, has the effect to vest the title to the property in the defendant in that suit; and consequently, that the plaintiff cannot recover of another for that which he himself has ceased to own. *Broome v. Wooton*, Yelv. 67. Other cases decide that the rule of *transit in rem judicatam*, extends no further than to bar another action for the same cause, against the same party. Of this latter class, the case of *Drake v. Mitchell*, 3 East, 258, may be regarded as the most important; and Mr. Greenleaf, after referring to it, states that the weight of authority seems in favor of the latter opinion, and the same views are expressed in numerous cases decided by different courts in the United States. Lord Ellenborough held, in the case last named, that a judgment recovered in any form of action, was still but a security for the original cause of action, until it was made productive in satisfaction to the party; and therefore, until then, that it could not operate to change any other collateral, concurrent remedy which the party might have. Attempt was made by a majority of the court in *Campbell v. Phelps*, 1 Pick. 62, to maintain that there was a distinction between cases of trespass or trover for goods, and trespass for a personal wrong or injury done to property; but Parker, C. J., who gave the opinion, was compelled to admit, that according to the modern decisions, nothing short of satisfaction of a judgment

against one trespasser, for any tortious act, would bar an action against his associates ; and Wilde, J., utterly denied that there was any such distinction, and held that a recovery against one person, without satisfaction, was no bar to an action against another, for the same cause, and that there was no difference in this respect between joint contracts and joint torts. Adverting to the maxim *solutio pretii emptionis loco habetur*, Chancellor Kent says, 2 Com. (10th ed.) 388, that "the books either do not agree, or do not speak with precision on the point, whether the transfer takes place, in contemplation of law upon the judgment merely, or whether the amount of the judgment must be first actually paid or recovered by execution." Three theories, it will be seen, are stated by that author. First, that the mere recovery of judgment transfers the title, and he refers to *Broome v. Wooton*, Yelv. 67, as an example of the cases where that doctrine is held. Secondly, that the recovery of judgment merely, does not have that effect ; but if execution follow, the two things combined transfer the property. The example given, is that of a case in *Jenkins* ; but the language of the opinion is, that "by the recovery and execution done thereon," the property of the chattel is vested in the trespasser. *Jenk. Cent.* 189. Language to the same effect is employed in *Shep. Touch.*, title Gift, where it is said, that if one recovers damages of a trespasser for taking his goods, the law gives the trespasser the property of the goods because he has paid for them ; but he has not paid for them, unless something has been done besides the issuing of the execution, which is only an incident of the judgment, an act of the clerk. Two cases, however, are cited, which support that view of the law, but neither of them seems to rest upon any substantial basis. *Curtis v. Groat*, 6 Johns. 168 ; *White v. Philbrick*, 5 Me. 147. Thirdly, the reference is to the rule of the civil law, that when the wrongful possessor of movable property, who is not in a condition to restore it, has been condemned in damages, and has paid the same to the original proprietor, he becomes possessed of the title ; and the learned author refers to *Drake v. Mitchell*, 2 East, 251, as an example of the decisions of the common-law courts, where that view of the law is maintained.

Commenting upon that case, he concludes by saying, this is the more reasonable, if not the most authoritative conclusion on the question. Some diversity of judicial decision still exists, even in this country; but the great weight of authority in the United States, is on the side of the theory, that nothing short of satisfaction transfers the title, and in that view of the question I entirely concur. *Morgan v. Chester*, 4 Conn. 387; *Hyde v. Noble*, 13 N. H. 501; *Sharp v. Gray*, 5 B. Mon. 4; *Hepburn v. Sewall*, 5 Har. & Johns. 212; *Barb v. Fish*, 5 West. Law J. 279; *Calkins v. Allerton*, 3 Barb. 173; *Jones v. McNeil*, 2 Bailey, 474; *Sheehy v. Mandeville*, 6 Cran. 253; *Cooper v. Shepherd*, 3 C. B. 266; *Knott v. Cunningham*, 2 Sneed, 204. Recovery of judgment merely, therefore, against one of the several tort feasons, is no bar to a suit against another for the same trespass; and it makes no difference whether the plaintiff did or did not take out execution on the first judgment, unless it also be shown that he received satisfaction. Where no satisfaction has been received, the law is clear, to the effect as stated; but the defendants contend, in the second place, that the recovery of judgment against the sheriff, and the receipt of partial satisfaction of the judgment from him, operate as a complete bar, upon the ground that the receipt of partial satisfaction is an election, on the part of the plaintiff, to seek his redress against that party. But the reason assigned for the conclusion, if it be a good one, proves too much, because the plaintiff, when he brought the first suit, elected to seek redress against the party prosecuted, and that election, if such it be regarded, was confirmed by his act, in prosecuting the suit to judgment. Subsequent acts, however, such as the taking out execution or the receipt of part satisfaction, add nothing to the force of the argument that the institution of the suit, and the prosecution of the same to judgment, show that the plaintiff had elected to seek redress against that party. A recovery of judgment against one is an election, undoubtedly, to regard the remedy as several, and such an election is final and conclusive. But the judgment is no bar to another suit against another of the co-trespassers, as has already appeared, unless the judgment has been satisfied. Full satisfaction by one tort feason, whether be-

fore or after judgment, is a good defence to a suit against any one of the others; but part satisfaction before suit would clearly be no defence, and it is not perceived that part satisfaction after judgment can have any other or greater effect. Suppose the part payment made by the judgment debtor had been made by him before he was sued; in that case it clearly would not have afforded him a full defence to the action, and if not, it is difficult to see how it can be any more effectual as a defence for a co-trespasser, because paid after judgment. Looking at the question as a question of principle, I am of the opinion that there is no middle ground on which a court of justice can safely stand in regard to it. When viewed in that light, it must either be held that the recovery of the judgment is a bar, or that it is no bar; and if the latter, as I hold, then nothing short of full satisfaction is an answer to a suit against another of the co-trespassers. Question is also made, whether the verdict and judgment against the sheriff are or are not conclusive upon the defendants. The affirmative of the proposition is assumed by the plaintiff, and the defendants maintain the negative. The facts of the case have already been stated, and need not be repeated, except to say that the case shows that the defendants were jointly liable for the same trespass; that they were duly notified of the pendency of the suit against the sheriff, and voluntarily appeared and conducted and controlled the defence.

Justice requires, says Mr. Greenleaf, 1 Greenl. Ev. § 522, that every cause be once fairly and impartially tried; but the public tranquillity demands, that having been once so tried, all litigation of that question between the parties should be closed forever. No man ought, however, to be bound by proceedings to which he was a stranger; but the converse of the rule is also true, which is, that by proceedings to which he is not a stranger, he may well be held bound. Under the term parties, says the same commentator, the law includes all who are directly interested in the subject-matter, and have a right to make defence, adduce testimony, cross-examine witnesses, and control the proceedings, and appeal from the judgment. Courts of justice in general agree that a judgment of a court of competent jurisdiction is conclu-

give in a second suit between the same parties or privies on the same question, although the subject-matter may be different, and *a fortiori* it is so when the subject-matter is the same. *Doty v. Brown*, 4 Comst. 71 ; *Castle v. Noyes*, 14 N. Y. 831. All parties are estopped by the judgment who had a right to appear, control the defence, and appeal from the judgment. The attachment in this case, in legal effect, had been made by the directions of these defendants, and they had given a bond of indemnity to the sheriff, and stipulated to save him harmless. They were, therefore, under a moral as well as legal obligation to defend the suit ; and when they were duly notified to make the defence, and appeared and assumed the control of it, in pursuance of such notice, they had the right to adduce testimony and cross-examine the witnesses, and might have appealed from the judgment. Appeal, undoubtedly, must have been taken in the name of the sheriff ; but as they had appeared in the case in pursuance of notice, and the control of the defence had been conceded to them, under the stipulation in the bond of indemnity, to save the sheriff harmless, it cannot be doubted that they might have appealed from the judgment. *Castle v. Noyes*, 14 N. Y. 332. Where the first action was against the agent, who had taken lumber by the direction of the principal, and the case showed that the principal appeared and defended the suit, the Court of Appeals, in the case last mentioned, held that the parties in the second suit, which was a suit against the principal, who gave the directions, were to be regarded as the same, and that the former judgment was conclusive. Parties appearing and defending under such circumstances are regarded as having the same rights substantially as the party in fact, and as having the same power and authority to use the judgment against the adverse party. *Smith et al. v. Kernochen*, 7 How. 217 - 219 ; *Calkins v. Allerton*, 3 Barb. 173 ; *Glass v. Nichols*, 35 Me. 328 ; *Wirfield v. Davis*, 14 B. Mon. 42 ; *Tarlton et al. v. Johnson*, 25 Ala. 314 ; *Eaton v. Cooper et al.*, 29 Vt. 444 ; *Peterson et al. v. Lothrop*, 34 Penn. State, 228 ; *Farnsworth v. Arnold et al.*, 3 Sneed, 252 ; *Train v. Gold*, 5 Pick. 387. The stipulation of the bond of indemnity was, that the defendants would pay all damages the sheriff might sustain, or which

Murray v. Lovejoy et al.

might be recovered against him by reason of his attaching the property, and, of course, they covenanted for the results or consequences of any suit which might be brought against him on that account; and I am of the opinion that such a covenant so connected them in privity with the proceedings, that the record of the judgment is as conclusive against them as the actual party to the suit. *Rapelye v. Prince*, 4 Hill, 119; 1 Greenl. Ev. § 523; *Carver v. Jackson*, 4 Pet. 86; *Case v. Reeve*, 14 Johns. 81; *Chapin v. Curtis*, 23 Conn. 388; *Emery v. Fowler*, 39 Me. 326. Judgment, therefore, must be for the plaintiff; but the question is also presented, as to what the amount shall be, and the authority is conferred upon the court "to enter such judgment as shall be proper." Attention should be called to the fact that the case is presented upon an agreed statement of facts. The Federal courts regard such statements as a part of the record; and hence it is that a writ of error will lie upon an agreed statement of facts. *Suydam v. Williamson et al.*, 20 How. 434; *United States, v. Eliason*, 16 Pet. 291; *Stimpson v. Railroad Co.*, 10 How. 329; *Graham v. Bayne*, 18 How. 60.

Regarding the question in that point of view, that it appears of record in this case that the measure of the injury sustained by the plaintiff was legally ascertained in his suit against the sheriff; that it also appears of record that \$830 of that amount has been paid, I am of the opinion that the plaintiff is entitled to recover the same damages as in the suit against the sheriff, deducting the amount received in part satisfaction of that judgment, as set forth and admitted in the agreed statement, but adding to the balance so ascertained a sum in the nature of damages equal to six per cent interest on account of the delay.

Judgment for plaintiff accordingly.

OCTOBER TERM, 1863.

FREDERICK E. SICKLES v. BAILEY W. EVANS *et al.*

When the specification of a reissued patent is consistent with that of the original, and where there is no positive conflict or absolute inconsistency between them, it may be true, in the absence of fraud, that the specification of the reissue is conclusive evidence that the invention was made, and the means to accomplish the result invented, although the two specifications are different from each other.

But where it appears on the face of the respective specifications, as matter of law, that the specification and claim of the reissued patent are for a different invention from that secured in the original patent, the rule cannot be sustained.

A reissue, by the express words of the statute authorizing the same must be for the same invention as the original; and, consequently, where it appears from a comparison of the two instruments, that the reissued patent is not for the same invention as that embraced in the original patent, the reissue is void.

BILL in equity to restrain the respondents from using a certain steam-engine which they purchased of George H. Corliss, and which was constructed by the vendor under the reissue of an original patent, granted to him on the 10th of March, 1849. It was claimed that the steam-engine in question was an infringement of the exclusive rights secured to the complainant in certain reissued letters-patent described in the bill of complaint, and on which the suit was founded. Letters-patent were granted to the complainant on May 20, 1842, for a new and useful improvement in the manner of constructing the apparatus for lifting, tripping, and regulating the closing of the valves of steam-engines. It did not appear that any application for the extension of the patent was ever made, but it was conceded that the invention had imperfections, that the patent never was extended, and that it expired by its own limitation in fourteen years from the time it was granted. The complainant, however, made efforts to remedy the defects of his invention, and he alleged that he afterwards completed a set of improvements for that purpose, and commenced to make a model of what he supposed was a perfect valve-gear for a steam-engine, and on the 28th of February, 1844,

filed a caveat to protect himself in his invention, which caveat at the time of the trial was on file at the Patent Office.

Steam-engines, with few exceptions, as the complainant alleged, were at that time operated by means of a cut-off valve independent of the steam valves ; that a part of the improvements made by him on exhaust-valves were adapted to engines of that description ; that in the hope of inducing persons who would not incur the expense of changing their cut-off valves, to use that improvement, he completed a model of a detached part of his invention, and, before he completed the model of the perfect valve-gear, applied for a patent of the same, as an improvement in the method of working the exhaust-valves ; and that letters-patent according to the application were granted to him on the 19th of October, 1844, under the title of a new and useful improvement in the method of opening and closing the valves of steam-engines.

At the expiration of the patent, on the 19th of October, 1858, an extension was obtained, and the extended patent was afterward surrendered on the 1st of January, 1861, and reissued in two parts, numbered 7 and 8. Defects, however, still existing in the respective specifications, they were both again surrendered, and on the 28th of January, 1862, the original patent was again reissued to the complainant, with additional amendments, and the same as last reissued was one of the letters-patent on which this suit was brought. After the original patent of 1844 was granted, the complainant, as he alleged, proceeded to perfect the model he had commenced before he made the application for that patent ; and when it was completed he made application for a patent on the invention, and a patent was duly granted to him on the 19th of September, 1845, but that the claims of the patent as issued, covered only certain parts of the improvement ; he also alleged that on the 19th of September, 1859, he obtained an extension of the last-named patent ; that he afterwards surrendered the said patent, and on the 21st of February, 1860, the same was reissued to him in six parts, which were intended to cover the whole of the improvements of his invention, as exhibited in his completed model of a perfect valve-gear. Doubts, however, having

arisen whether the specifications of one or more of the reissued patents were sufficient, the several patents were subsequently surrendered, and, on the 21st of January, 1862, the original patent of the 19th of September, 1845, as extended, was again reissued to the complainant, and this was the other reissued patent upon which the suit was founded. The first patent granted to the complainant had expired long before this suit, and it was only referred to as showing the state of the art, at the time his later improvements were made.

The complainant described it as certain improvements in the manner of constructing and arranging the apparatus for lifting and tripping valves of steam-engines, and by which the steam could be more easily cut off at any desired part of the stroke, than by the means before adopted; and also as an improved water reservoir and plunger, which served to prevent the slamming of the valves in closing, and consequently to preserve them in good working order for a great length of time.

His patent contained two claims, as follows: —

1st. The reservoir in which he had contrived and arranged the valve-stem, the spring on the lifter, the adjustable sliding-piece with its wedges or inclined planes and their immediate appendages, so as to co-operate with each other, and effect the tripping of the valves and the cutting off of the steam, &c., &c.

2d. The manner described of regulating the closing of the valves and of effectually preventing them from slamming, by means of a water reservoir furnished with a piston or plunger attached at the lower end of the valve-stem, and operating within an adjustable cup or secondary reservoir so as to accomplish the desired effect.

Causten Browne and *E. W. Dickerson*, for complainant.

E. W. Stoughton and *B. R. Curtis*, for respondents.

CLIFFORD, J. Suits were instituted by the inventor alleging the infringement of the exclusive rights secured to him, and in the course of the investigations consequent thereon it became necessary for the courts to construe the respective claims of the patent. Their construction was directly involved in *Sickles et al. v. The Worcester Manufacturing Company*, heard before Mr.

Justice Grier at Trenton, N. J., September Term, 1856, as appears by an opinion subsequently delivered by him in that case, in which he held, in respect to the first claim, that the combination and arrangement of all the parts of the invention as described in the patent, had reference to the new manner, method, or arrangement of machinery therein described, for tripping puppet valves, and that the specification did not set forth any general principle, or any other mode in which the inventor proposed to apply that principle to valves of a different character, and of a totally different mechanical action. Thorough examination also was made at the same time, of the second claim of the patent, and in respect to that claim the learned judge held, that it was apparent that the apparatus described in the first claim for tripping the valves, and that described in the second, must be combined to effect the purpose intended, and he adduced that conclusion from the fact that if the valves, when tripped, should be suffered to fall to their seats without being checked by the device described in the second claim, the whole apparatus would be practically useless. Hence he held that the two things constituted one whole invention, having for its subject the valves known as puppet or lifting valves. Description is given in the first place of the devices for operating those valves, and then follows the description of the water reservoir, whose object and purpose are "to prevent them from slamming in closing, which would otherwise destroy the machinery." Although the specification mentioned "oil or other fluid," as well as water, still, the learned judge held that it was plain, that the word "fluid" was used in its popular sense as a synonyme for liquid. The patentee insisted on that occasion, that the second claim of his patent covered the use of air as well as water for the described reservoir, but the same learned judge, after explaining very satisfactorily the difference in the action of the one from that of the other, as respected the invention under consideration, held that the claim was for regulating the closing of the valves, and preventing them from slamming, by means of a "water reservoir," and that there was no intimation that an elastic fluid could be used for the same purpose, or "how it should be used." The patent of the 19th of

October, 1844, is also for "a new and useful improvement in the method of opening and closing the valves of steam-engines," or, as more fully described in the specification, it is for a new and useful improvement in the apparatus for opening and closing the steam and exhaust valves of steam-engines, so that the steam will act with greater practical efficiency than it would without the improvement. The inventor first describes the various parts of the apparatus which, prior to that time, had generally been used to work both the steam and exhaust valves, and the usual combination and arrangement of those parts which had previously been employed, in order, as he states, to show the difference "between the usual mode and his mode of, and improvement in, arranging and combining those parts so as to produce new and useful results. Superadded to the details given in respect to the usual mode employed prior to his invention, the patentee states that while one lifting-rod, with its feet, lifters, and valves attached, was in motion, the other lifting-rod with its attachments remained stationary. Having explained the state of the art at the date of his invention, he then proceeds to describe the improvement for which he claimed a patent. Referring to the general description, it consists in effect in so regulating the period of the movements of the valves, as to leave the piston free to complete each stroke, and also to give any desirable lead to the exhaust-valves. While it accomplishes those objects, it also, as the patentee states, causes the piston to be in "equilibrio" near the completion of its stroke, which is effected in the first instance, by opening the lower exhaust-valve before the piston finishes its upward stroke, and before the upward exhaust-valve is closed, and secondly, by opening the upper exhaust-valve before the piston finishes its downward stroke, and before the lower exhaust-valve is closed, but in both cases the steam-valve is opened without a lead, and after the closing of the exhaust-valve on the corresponding end. To that general description, the patentee also adds, that his invention further consists in a peculiar arrangement of the toes on the rock-shaft, the feet on the lifting-rods, and the connection of the lifters with the valve stems to carry the before-mentioned improvement into effect; and he then

gives a very minute description of the several devices of what he calls his improved combination, and the arrangement of the relative position of the toes and feet, together with a description of the effect, which such combination has upon the motion of the toes and feet during the revolution of the engine. Special mention is also made of the fact that the nuts attached to the stems of the steam-valves, are so arranged as to be adjustable, and allow a slip of the lifters thereon, of an inch more or less, and equal or nearly so, to the rise of the toes above the upper surface of the rock-shaft. Extended explanation is then given of the connection which the preceding combination has with the steam and exhaust valves, and of the improved effect which the whole combination and arrangement have upon the operation of the valves, and the more efficient working of the engine. Modifications of the combination and arrangement of the apparatus, are then suggested, but they all, as the patentee well states, involve the same mechanical principles, and manifestly were not intended to accomplish any different result or to change the mode of operation. Certain results are then described as effected by the combination and improvement in the relative position of the toes on the rock-shaft with the nuts on the valve-stems, and their position relative to the valves.

First. Any desirable "lead" may be given to the exhaust-valves, without the piston of the steam-cylinder being subjected to any opposing force or difficulty, in consequence of such movement.

Secondly. Both exhaust-valves may be open momentarily at the same time, so that the piston shall be in equilibrio, as before described.

Thirdly. The result is, or may be, that a portion of the steam which is being exhausted, is shut into the steam-chest nearest the piston, so that it may be used in combination with steam emitted from the boiler, to drive the return stroke.

Complying with the requirement of the Patent Act, the inventor then specifies and points out what he claims therein as new, and desires to secure by letters-patent. He first claims what he denominates as his improvement in the periods of the movements

of the valves, by which they are opened and closed relatively to each other and to the movement of the piston, by means of which the piston completes each stroke in equilibrio, or nearly so, without admitting steam against the movement of the piston by a lead to the steam-valve. Such is the substance of the first claim; but it is accompanied by a repetition of the description of the means by which the described result is accomplished, and to that description the patentee adds, that the movement of the steam-valves is so regulated as to admit steam to the cylinder, only after the exhaust-valve on the corresponding end of the cylinder has been closed. His next improvement he claims as a means to carry the first, which he characterizes as the essential improvement, into effect; and such undoubtedly is the true nature and character of the improvement. Taking it as described in the claim, it is the arrangement of the toes and the rock-shaft, in such a manner relatively to the location and form of the feet on the lifting-rods, that at the middle, or nearly so, of the rocking motion of the rock-shaft, both lifting-rods with their exhaust-valves, shall be partly up, as described in the specification. Incident to that arrangement, and in combination with it, the patentee also claims the slip of the lifters on the steam-valve stems, to insure the closing of the exhaust-valves before the opening of the steam-valves, on the corresponding ends of the cylinder. Proper reference is made in each claim to the specification, so that the several claims are not for a result, but for the means by which the result is accomplished. The assignees held the title to the patent from the 5th of August, 1848, to the expiration of the original term, but the invention became revested in the complainant on the 19th of October, 1858, when the patent was extended for the further term of seven years. Surrender of the extended patent was afterwards made, and on the 1st of January, 1861, the same was reissued in two parts, as alleged in the bill of complaint. Comment on the reissued patents of that date is unnecessary, as the original patent was again surrendered and reissued, as already explained. The parties concede that the description of the invention, as contained in the last reissue, is substantially the same as that in the original patent, except in one or two par-

ticulars. Those particulars consist of certain additions to the description in the reissued patent, which when properly considered in connection with the other parts of the instrument, cannot be regarded as affecting the questions involved in this suit. Direct reference is made in both patents to the alleged improvement, as one consisting, among other things, in the combination of the toes attached to the rock-shaft, with the nuts attached to the stems of the steam-valves, and the relative rise of the toes above the upper surface of the rock-shaft, starting at the connecting point even with the upper surface. All must agree that in these respects the description in the two patents is identical; and they both speak of the combination as including the slip of the lifters upon the steam valve-stems, with the peculiar operation of the valves for admitting steam to and exhausting the same from the cylinder, giving thereby greater efficiency to the engine, and increasing speed or saving steam or fuel. Complete identity in the devices also, as well as in the several combinations and arrangement of the parts, are shown throughout, as is obvious from the entire comparison. Having copied the entire substance of the original specification into the reissued patent, and adopted the same, the patentee then proceeds, to use his own language, "to point out the improvement herein patented," which, as he in effect states, is particularly shown in the second sheet of the drawings, and by the use of which, very high motion in opening the exhaust-valves is secured, without moving the valve a long distance previously to its opening, as must be done in all other methods known before, in which both valves were moving at the same time.

Special reference is also made to the same sheet of the drawings, as the foundation of the explanations given in respect to the alleged differential motions of the exhaust-valves, and the manner in which the same are effected. When describing the operation, the patentee states that the exhaust-valve, which for the moment is farthest from the piston, receives the largest amount of motion, and that the effect is, that a free escape of the steam is given from that end of the cylinder, without compelling the other exhaust-valve to move an equal distance with it. Two

claims are made by the patentee, and it will be seen that they are widely different from those made in the original patent. He here claims in the first place: "Giving to each exhaust-valve, alternately, while the piston is at or near the end of the cylinder farthest from it, a large amount of motion, as compared with the motion of the other exhaust-valve at that time, so as to more freely exhaust the cylinder with less extent and greater ease of motion to the valves than has heretofore been done." Secondly, he claims: "Imparting these motions to the exhaust-valves by means of a rocker interposed between the first motion from the engine and the valves, so that it will increase and diminish its leverage, relative to each valve while moving them, and thereby impart my improved motion." Separately considered, that part of the description here referred to, as an addition or amendment to the specification of the original patent, would seem to indicate that the patentee contemplated, not only that the exhaust-valves should move together, but that one of them should move while it was closed. Mechanism, however, to move the exhaust-valves after they are closed, or before they commence to open, is certainly not described in the original patent, and it is equally clear that the additions or amendments made to the specification, as exhibited in the reissued patent, neither describe nor suggest any new mechanism to accomplish any such function. Recurrence to the specification will show, that the patentee first states what the usual mode of working steam-engines was, prior to the date of his invention, and then describes his own improvement. His general description of the usual mode prior to that time is, that while one lifting-rod, with its feet, lifters, and valves attached, is in motion, the other lifting-rod, with its attachments, remains stationary, or in other words, that while the piston was running up, the exhaust-valve at the upper end of the cylinder was open to let the steam run out, but that the lower exhaust-valve was closed to prevent the steam from escaping, as it entered from the boiler, through the steam-valve to drive the piston up, and so, on the other hand, as the piston was running down, the exhaust-valve at the lower end of the cylinder, was open to let the steam below the piston run out, but the upper exhaust-valve was kept

closed for the same reason as that given in respect to the lower exhaust-valve when the piston was running the other way.

Taken as a general remark, therefore, it is correct to say that both exhaust-valves were never open at the same time, and the same may be said of the steam-valves, as then operated, except that one of them was usually opened just before the piston reached it, giving it a "lead," as it was called, in order to slow the piston as it was driven home. Such was the state of the art, as substantially described by the complainant himself, when he invented what he very properly calls his new and useful improvement on the apparatus for opening and closing the steam and exhaust-valves of steam-engines. Starting upon the basis of his own prior invention, then duly secured by letters-patent, but which have since expired, he devised the improvement afterwards embodied by him in the original patent under consideration. Observing that the exhaust-valve at the upper end of the cylinder, was open as the piston was running up, but that both exhaust-valves were never open at the same time, he conceived the idea, among other things, that if he should also open the lower exhaust-valve just before the upward stroke of the piston was completed, keeping the steam-valve at that end closed, the steam at the lower end of the cylinder would begin to escape as the piston completed its ascent, or at least before it commenced to return, so that when the steam should be let in to drive the piston down, or on the return stroke, the opposing force, as it is called in the patent, or the back pressure from the steam that drove the piston up, might be removed.

Prior to that time, the ordinary mode of working steam-engines had been, that one exhaust-valve was opened and shut before the other was opened, each moving only during a stroke of the piston or half revolution of the engine, that is, one exhaust-valve opened at the beginning of a stroke, and was shut at the end of the same, and then the other opened at the beginning of the subsequent stroke, and was closed when the stroke was completed.

Knowing that such was the ordinary operation of the exhaust-valves, the patentee saw that alterations must be made in the mechanism for moving them, as compared with the apparatus

usually employed for that purpose, or with that embodied in his old patent, in order to carry the new idea into effect, as it would obviously require that both exhaust-valves should be open, for a limited period at the same time, instead of one being opened and shut before the other was opened, as in the ordinary mode of working steam-engines. Difficulties, however, attended the adjustment of the apparatus to accomplish that object, on account of the conflicting mechanical principles which the plan involved. Means could easily be devised and arranged to cause both exhaust-valves to be open for a limited period at the same time, but it would not do to have the steam-valve open at the end of the cylinder towards which the piston was running, while the exhaust-valve at that end was also open, because if such was the arrangement, the steam would run in at the steam-valve, and run out at the exhaust-valve, which would occasion a waste, if it did not defeat the operation. Unless, therefore, the steam-valve could be kept closed until the exhaust-valve at the corresponding end should also be closed, the new idea could not be successfully carried into effect. Lifting-rods were employed in the old patent of the complainant to move both the steam and exhaust-valves, and the same devices with a certain modification in the attachments are also employed to accomplish the same purpose in the original patent under consideration in this case. Remark should also be made, that each lifting-rod had an exhaust-valve at one end, and a steam-valve at the other, and the arrangement was such, in the old patent, that when the rod moved the exhaust-valve, it also moved the steam-valve, and could not move the one without moving the other also at the same time; but the rods themselves did not move together, and hence it was true, as already stated, that one exhaust-valve was opened and shut before the other was opened, and the corresponding operation of the steam-valves was also in the same way. Complainant's new plan required that both exhaust-valves should be kept moving for a limited period, at the same time, but in order to do that, he must move both rods at the same time, because one exhaust-valve was upon one rod, and the other upon the other rod, and consequently if he did not move both rods at the same time, he

could not move both the exhaust-valves, as the new plan required. Conclusive reasons, therefore, existed why he should move both rods at the same time; but another difficulty then arose, which was, that if he did so, he would necessarily move the steam-valves also, unless he could devise some means to obviate that difficulty, while the two rods were moving together, to carry the two exhaust-valves. All that was required was, that the rods should move at the same time for a limited period, but he could not let the steam-valve and the exhaust-valve at the same end of the cylinder, be open at the same time, because if he did, the steam, as before explained, while it would run in from the boiler, would run out at the exhaust-valve. Nothing would overcome this difficulty, unless the inventor could contrive some means by which the steam-valve should be kept closed, until the two exhaust-valves had ceased to be open at the same time. Provision was accordingly made by the patentee, for the slip of the steam-valve upon its lifter, or as particularly described in the patent, for the slip of the lifter upon the steam-valve stem, until the lifter carrying the exhaust-valve at that end of the cylinder, should come to a state of rest. Consequently both exhaust-valves are kept open for a limited period, at the same time, by a coexisting motion of the lifting-rods, while the steam-valve at the end of the cylinder towards which the piston is running is, by the means described, kept closed until the two exhaust-valves cease to move together, as required in the patent. The coexisting motion of the rods which carry the valves is certainly described in the original patent, but it is specially described, and must be understood as continuing only during the limited period that both exhaust-valves move at the same time. Desiring to keep both exhaust-valves open together for a limited period, he devised the coexisting motion of the lifting-rods to accomplish that function, and he described it as intended for that purpose and no other. Confirmation of that view is derived from the fact that the patentee describes an apparatus for suspending this peculiar combination altogether, and for so adjusting the movement of the two exhaust-valves, that they will not both be open together, when of course there would be no coexisting motion of

the lifting-rods. Resting the case here, the conclusion would be entirely satisfactory that the patentee never intended to move the exhaust-valves or either of them, after they were closed, or before they commenced to open ; but further confirmation of that view is derived from other parts of the patent. No one, I think, can read the specification of the original patent and fail to see that the complainant, when he framed it, intended to accomplish three things. First, to describe the apparatus usually employed for opening and closing the steam and exhaust-valves of steam-engines, and its mode of operation.

Secondly, to give a full description of his own improvement on such apparatus, and its mode or modes of operation for accomplishing the same objects.

Thirdly, to point out clearly the difference between the usual mode and his improved mode, so as to show that his improvement would produce new and useful results.

Under the first head, he describes every device usually employed for that purpose prior to the date of his invention, and the description includes the lifters, the lifting-rods, the feet on the lifting-rods, and the rock-shafts, as well as the toes on the rock-shafts, and the valve-stems and rock-shaft pin, and the general statement is, as before remarked, that while one lifting-rod, with its feet, lifters, and valves attached, is in motion, the other lifting-rod, with its attachments, remains stationary. Any argument to show that reference is there made to the use of puppet or lifting valves is unnecessary, as the decision of the court in the case of *Sickles et al. v. The Gloucester Manufacturing Company*, is conclusive upon that subject. Slide-valves move all the time, but the puppet-valve cannot move after it has reached its seat, and as the description is to the effect, that one lifting-rod, with its feet, lifters, and valves attached, remained stationary, while the other, with its attachments, was in motion, it is clear to a demonstration, that the reference is to puppet-valves, and not to slide-valves. No reasonable doubt can arise upon that subject, and it is also proper to remark in this connection, that an examination of the complainant's description of his improvement, and of the several combinations therein men-

tioned, will fail to furnish the slightest indication that he intended, in any one of them, to make any change in that device. Describing the nature of his general improvement, he says, it consists in so regulating the period of the movements of the valves, as to leave the piston free to complete each stroke, also to give any desirable lead to the exhaust-valves, and allow the piston to be in "equilibrio" near the completion of its stroke, it not being absolutely necessary, if desirable, to give a lead to the steam-valves as heretofore. Careful attention to the manner in which the function is accomplished, as represented in the specification and heretofore explained, will show beyond doubt, that it is the exhaust-valve away from which the piston is running, that is here required to be opened. Suspension or diminution of the motion of the piston is accomplished, by allowing the steam admitted to drive the cylinder, or some portion of it, to escape through the proper exhaust-valve, just before the piston completes its stroke, and, of course, when the exhaust-valve is opened for that purpose, the steam-valve at that end of the cylinder must be kept closed, else the object of the movement would be defeated. None of the combinations of the old expired patent would meet this latter requirement, but the patentee in his improved plan, accomplishes it without any difficulty, by means of the contrivance for the slip of the valve upon its lifter; and the manner of its accomplishment affords additional evidence, that the patentee never contemplated that the exhaust-valves, or either of them, should move after they were closed, or before they commenced to open. Means are also described in the specification for carrying the improvement into effect, which consist, as stated by the patentee, in a peculiar arrangement, of the toes on the rock-shaft, feet on the lifting-rods, and the connection of the lifters with the valve-stems, showing conclusively, that the patentee contemplated the use of the same description of valves, as those he had employed in the old patent, and that he regarded his new invention as an improvement upon the one which that patent secured. Passing from that subject for the present, it becomes necessary to examine the other patent, on which the suit is founded. Referring to the statement of the case, it will be

seen, that an original patent was also granted to the complainant on the 19th of September, 1845, and it will be sufficient to say, in addition to the explanations already given, that the other patent in controversy is the last reissue of that patent, and bears date on the 21st of January, 1862. As described in the original patent, the invention was for a new and useful method of tripping the drop cut-off valves of steam-engines, and regulating and adjusting the same. Motion for operating the valves of that description, as the patentee states, was derived, prior to the date of his invention, from the lifter, which approached the state of rest as the piston of the engine approached the middle of the stroke, or its maximum velocity, and the valve was tripped by the same motion as that which lifted it, and consequently very great nicety was required in the adjustment, so as to regulate the extent of the cut-off at about half-stroke. His invention in this patent was designed to remedy that difficulty, and its principle or character, as the inventor represents, consists in tripping the valve by a motion independent of the lifting-rod or rods, and also in combining the various parts, in such a manner as to regulate the cut-off with accuracy, during the action of the engine. Description is then given of the means by which those functions are accomplished, and that description is also accompanied by the suggestion of a certain modification, whereby the spring-arms may be shifted in the teeth of the sector, and be brought nearer to, or be removed farther from, each other, "and thus cut off at a less or greater portion of the stroke." Reference is then made to one of the drawings, as representing his first invention, which, it will be recollected, was secured to him by the old expired patent. He there refers to it as his improved drop cut-off, with the lifter A', projecting from the lifting-rod A", and operated by the toes of the rock-shaft C, in a manner, as he states, "not necessary to describe." Instead of disengaging the spring of the lifter, however, from the stem to the drop-valve, by causing it to strike a permanent cam, as it rises, he employs, as he therein represents, a long spring projecting from the lifter, and fitting in a notch in the stem of the drop-valve, as heretofore made, but extending beyond that, and having a curved projection on one of

its faces and at the extreme end, against which the outer face of an arm or wiper strikes, as it vibrates on its vertical axis. According to the description, the outer face of that arm or wiper, is parallel with its shaft, and of greater length than the motion of the lifter, so that it can act on the curved projection of the spring, as it is carried up and down by the lifter, and thus cause it to drop the valve. Suggestion is also made, that instead of the horizontal vibrating motion of the arm or wiper, the spring may be disengaged from the stem of the valve by a vertical, descending motion, as the lifter rises, which motion may be derived from any moving part of the engine. Based upon these representations the patentee claims, first, "Tripping the drop-valve of the cut-off by a motion independent of the lifters"; and secondly, "Combining the wiper that drops the valve of the cut-off, whether working horizontally or vertically, with any of the moving parts of the engine, other than the lifters or their rocking-shaft, by means of the sector and arm or arms, by the instrumentality of which the extent of the cut-off can be regulated at pleasure during the action of the engine, from the full to the least portion of the stroke." Taking the statement of the patentee as correct, the valve was tripped in the method practised prior to the invention under consideration, by the same motion that lifted it, and the motion was derived from the lifter which approached a state of rest as the piston of the engine approached the middle of its stroke. When the piston of the engine approached the middle of its stroke, it was then at its maximum velocity, and as the lifter actuated a spring which alternately took hold and let go of the valve-stem, very great nicety was required in the adjustment of the apparatus, so as to regulate the extent of the cut-off at about half-stroke. The patentee expressly states, that the object of his invention was to remedy that difficulty, and he also states, that the principle or character of his improvement consists in tripping the valve, by a motion independent of the lifting-rod or rods. Plainly his invention is, as he describes it, a new and useful method of tripping cut-off valves, by a motion independent of the lifter, and as there described, it has nothing to do whatever with any improvement in the working of valve-catches or valve-

rods, as is evident from a perusal of the entire specification. Entire want of reference, in the specification, to any such improvement, would seem to be a sufficient answer to every such pretence; but the specification itself furnishes even a better answer than that, and one which is entirely conclusive, because it amounts to an express declaration that he, the inventor, did not contemplate any change whatever in valve-gear, or in the means of working the valves. Had he intended to make any alterations in the valve-gear, as shown in his old patent, or if he had designed to give a coexisting motion to the valve-rods as now claimed, it is reasonable to suppose that he would have referred to those matters, as material parts of his improvement, and would have described the nature of the contemplated alterations in the valve-gear, and the means of giving the coexisting motion to the valve-rods; but he did neither, nor is there anything in the specification from which any such inference can reasonably be drawn. On the contrary, he refers to his former invention secured to him in the old patent, and characterizes it, as his improved drop cut-off with the lifter projecting from the lifting-rod, and operated by the toes of the rock-shaft, in a manner not necessary to describe. Valve-gear apparatus was fully described in the old patent to which he referred, and it will be remembered that it embraced no means whatever, to give a coexisting motion to the valve-rods; but the complainant himself concedes that whenever one lifting-rod, with its attachments, was in motion, the other remained stationary. Mistake could not be made by him upon this subject, as it was his own invention; and when he spoke of the apparatus as being of a character not necessary to describe, he evidently meant to be understood, as adopting it as the valve-gear of his new improvement.

Examination will now be made of the reissued patent of the 21st of January, 1862, which is the only other patent of the complainant that remains to be considered. Improvements secured by reissued patents are very apt to be expanded, but the change in that behalf in this case, is so great that in comparing the original patent with the reissue under consideration, it is difficult to find sufficient similarity to establish the

identity. What was a new and useful method of tripping the drop cut-off valves of steam-engines, and regulating and adjusting the same, has become a new and useful improvement in steam-engines; and what was an improvement in tripping cut-off valves, by a motion independent of the lifter, has become an improvement in the coexisting movement of two reciprocating catching-pieces. Another feature of the improvement, as described in the reissued patent is, that each of the two reciprocating catching-pieces move during a longer time than half a revolution of the main shaft of the engine, whereby, it is said, a greater capacity for adjustment, in opening the valve, and a greater certainty in connecting with the catch are secured, than if one catching-piece should come to a state of rest before the other moves, and each catching-piece should move only during one half the revolution of the engine. Complainant then refers to a certain valve-rod or stem which has, as he states, a piston or plunger attached to its upper end, and operating within a reservoir shaped smaller at the bottom, which may confine the fluid contained therein as the plunger descends, substantially as described in his old patent, so as to regulate the velocity of a falling weight, connected to the stem, that is sufficient to overcome all friction in closing the valve. To this rod or stem, as the patentee states, the valve must be attached, and he also adds in this connection, that either single, double, or slide valves may be used. Certain other representations of the specification must also be briefly noticed. Speaking of the catch-pieces, the patentee states, that they derive a reciprocating opening and closing motion from the valve-gear, and operate to determine the admission of steam, when their acting surfaces are in contact with the catches. He also states, that the shape of the toes on the rock-shaft C, and the feet on the lifting-rods are such, that one rod is moved before the other comes to a state of rest, thereby imparting a coexisting movement to the catch-pieces, permitting them to pass beyond the engaging points, and to return to them to open the valve. And, lastly, he states that the coexisting movement of the catch-pieces can be communicated to them by other sort of valve-gear than that shown, and that any valve motion, having a proper

coexisting movement in any of its parts, can be used to move the catch-pieces. Such is the substance of the representations upon which the claim is based, so far as it is material to consider them in this case, and the claim is, "imparting a coexisting movement to two reciprocating catch-pieces in the operation of the trip cut-off valves, substantially as described." Compare the language of this claim with the claims of the original patent, and it is clear that they are quite foreign to each other. Strike out the claims of the original patent and insert the claim here made in their place, and no one can doubt that the claim would be void, because there are no means whatever, described in the specification of the original patent, to justify any such claim. Two fatal objections would arise to this claim, if, instead of occupying the place it now does, it were presented as the claim of the original patent. First, it would appear to be a claim for what the patentee had not invented; and, secondly, it would be a claim for a new motion, without the description of any means to accomplish the described result. Sufficient description of the alleged improvement, and of the means to accomplish the described result, have been imported into the reissued patent, and the complainant contends, that the interpolation of these passages entirely overcomes both of the objections that would have arisen to the claim, if it had been made in the outset, as the claim of the original patent. Judging from the course of the argument, the proposition is, that in the absence of fraud, the allegations in the specification of reissued letters-patent, however different they may be from the description in the specification of the original patent, are nevertheless conclusive evidence that the invention was made, and the means to accomplish the result invented, as therein described. Where the two specifications are consistent, or where there is no positive conflict or absolute inconsistency, the proposition may be correct, but where it appears on the face of the respective specifications, as matter of law, that the specification and claim of the reissued patent are for a different invention from that secured in the original letters-patent, such a rule cannot be applied. Whenever it appears, upon a comparison of the two specifications and claims, as matter of law,

arising on their construction, that the reissued patent is for a different invention from that secured in the original patent, then the reissued patent is void and of no effect. Beyond doubt, whenever any patent, as issued, is inoperative or invalid by reason of a defective or insufficient description, or specification, or by reason of the patentee claiming, in his specification, as his own invention, more than he has a right to claim as new, if the error has arisen by inadvertency or mistake, and without any fraudulent or deceptive intention, the thirteenth section of the Patent Act authorizes the commissioner, upon the surrender to him of such patent, and the payment of the prescribed duty, to cause a new patent to issue to the said inventor, for the same invention, for the residue of the period then unexpired for which the original patent was granted, in accordance with the patentee's corrected description and specification. 5 Stat. at Large, 122. Such reissue, however, must, by the express words of the section authorizing the same, be for the same invention; and consequently where it appears, on a comparison of the two instruments, as matter of law, that the reissued patent is not for the same invention as that embraced and secured in the original patent, the reissued patent is invalid, because that state of the case shows that the commissioner has exceeded his jurisdiction. *Battin v. Taggart*, 17 How. 83; *O'Reilly v. Morse*, 15 How. 111, 112; *Potter v. Holland*, Law's Dig. 618, per Ingersoll, J.; *Allen v. Blunt*, 3 Story, 744; *French v. Rogers*, Law's Dig. App. 66, per Kane, J. Applying that rule to the present case, I am of the opinion that the reissued letters-patent, under consideration, must be deemed invalid, for the reason that the patent is not for the same invention as that embodied and secured in the original patent, which fully appears as matter of law from a comparison of the two instruments. In view of the conclusion announced as to the construction of the respective patents of the complainant, very little need be said upon the subject of infringement. The respondents purchased their engine of one George H. Corliss, who constructed it under the reissues of an original patent granted to him on the 10th of March, 1849. The parties and their counsel have proceeded, throughout the

hearing and trial, upon the ground that the engine was constructed according to the patent, and there is no evidence in the case to raise any doubt upon that subject. Assuming that to be so, then the only question is, whether the patented invention of the vendor of the engine in question, conflicts with one or both of the reissued patents of the complainant. Nothing need be added to what has been said respecting the inventions of the complainant, so that it only remains to explain the patented invention of the vendor of the respondents. He invented new and useful improvements in steam-engines, as represented in his patent. They are divided into three parts, but it will only be necessary to refer to the second and third, because the other is entirely disconnected from the particular controversy in this case. Among other things, he contrived the means of using slide-valves, and introduced into the steam-engine a new method of working them, which consisted in communicating motion to the two valves from one rock-shaft, by connecting each valve with a separate arm or crank-wrist of the rocker, and he so connected that method of working, with the governor, so called, that the steam-valves should be disengaged at such a point in the stroke of the piston, as the governor should indicate, so that as the arms of the governor rise or fall, an unfailing indication was given of the exact point where the cut-off should take place. He also combined liberating gear with slide-valves, and devised means for operating the combination upon an entirely new plan, and he also contrived a wrist-plate, which preserves a positive connection with the engine all the time, causing the catches to move, and is of itself sufficient to show that the means employed in the engine of the respondent, are substantially different from those employed by the complainant. As was well remarked by the court in the case already referred to, one has perfected one combination of devices, to trip a puppet-valve, and the other a different, for a different sort of valve. Suffice it to say, without pursuing the subject further, that I am of the opinion that the respondents do not infringe either of the patents of the complainant. The bill of complaint is, therefore, dismissed with costs.

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The presumption of originality arising from the grant of letters-patent extends back only to the date of the filing of the application in the Patent Office.

The mere conception of an improvement, however perfect the idea may have been, and although described to a third person, is not invention in the sense of the patent law, if the improvement was never completed.

In order to constitute an invention, the originator of the idea must have embodied his thought in some distinct form, and reduced it to practice.

This rule is subject to the qualification, that he who first invents shall have the prior right, if he uses reasonable diligence in adapting and perfecting his conception.

If a person employed in inventing, from discouragement or dissatisfaction, breaks up what he has accomplished, and lays the parts aside, not wholly intending to abandon the subject, but wholly uncertain whether he will ever resume it, and without any controlling impediment in the way of an application for a patent, and another in the mean time, without any knowledge of that which was so suspended, invents the same thing, reduces it to practice, takes out his patent, and introduces his patented invention into public use, the latter must be regarded as the original and first inventor.

But where some of the parts used in an inventor's experiments upon an improvement were preserved by him, and finally embodied in his Patent Office model, and where the evidence indicated that he only intended to postpone his application for a patent until certain objections to his making an application, not however relating to the completeness of his invention, ceased to exist, it was *held*, that the invention had not been abandoned.

Where, in the construction of a foreign patent in a foreign language, two different translations of a certain phrase were suggested, that one which was more literal, which better accorded with the other parts of the instrument not involved in doubt, and was more in harmony with the nature and application of the invention, was adopted by the court.

BILL in equity to recover damages for an alleged infringement of certain letters-patent, and praying for an account and an injunction. On the 3d of April, 1855, letters-patent were granted to Rollin White for certain new and useful improvements in repeating firearms. On the 17th of November, 1856, he assigned the exclusive right to make, use, and vend the improvement embodied in the first claim of his patent, to the other complainants. The bill alleged that the respondents, at Worcester, on the 1st of January, 1858, and after that time, made and sold twenty-five thousand pistols and revolving firearms, substantially involving the complainant's patented improvement.

It was admitted in the answer that letters-patent were granted to Rollin White, but it was denied that he was the original and first inventor of the improvements therein described. It was

alleged that anterior to the supposed discovery thereof by the patentee, the same invention, or substantial and material portions thereof, claimed as new, had been described in certain published works, and had been patented to various persons in foreign countries, and known and used by various persons in the United States, and also that the alleged invention of the complainant had been in public use and on sale for more than two years before his application for a patent therefor, with his consent and allowance; and it was denied that at any time prior to the date of his patent, the patentee had invented and reduced to practice any such improvements as those described and claimed in his specification. The application was filed on the 20th of February, 1855. In his specification the patentee stated that his invention related to firearms having the rotating many-chambered cylinder, and he divided his improvements into four parts; but as the first of his classification is the only one considered in this case, description of the others is unnecessary.

According to the specification, this consisted in extending the chambers through the rear of the cylinder, for the purpose of loading them at the breach, from behind, either by hand or a self-acting charger, from a magazine placed in the rear of the cylinder. The description was in substance as follows: First, the rotating chambered-cylinder having the chambers bored right through it, and made slightly conical, with the smallest part in front, in order that a cartridge might be inserted easily at the back, and that the ball might fit tightly, so that when fixed in its place, it should remain, and not go through till the charge exploded. Secondly, the pin upon which the breech rotates, by means of a tooth attached to the trigger. Thirdly, the stock, which is constructed with a recess or groove in the side of it, to afford sufficient room in the rear of the cylinder, opposite one of the chambers, for the insertion of the charge by hand, at the rear opening of the chamber. Fourthly, the fixed breech-piece arranged opposite the barrel, behind the cylinder, to serve as a breech to the chamber, which happens to be in a line with the barrel. The claim involved in the suit was, extending the chamber of the rotating cylinder right through the rear of the said

cylinder, for the purpose of enabling the chamber to be charged either by hand or a self-acting charger, substantially as described.

The respondents produced and put in evidence letters-patent granted to Hertog and Devos, in Belgium, on the 17th of June, 1853, as anticipating the complainants' patent by about two years. It appeared from the testimony that, under this foreign patent, pistols constructed in conformity with the first claim of the complainants were publicly sold in the years 1853 and 1854. A French patent of one Lefaucheur was also introduced by the respondents as exhibiting a series of revolving barrels, each with an opening at the rear end for convenience in loading, and having a guard-plate or breech-plate to prevent the passage of the flame towards the rear, at the discharge. It was contended by the respondents that complainants' pistol was simply the application of the Lefaucheur method to the arm known as the Colt pistol, where the breech is composed of a cylinder of chambers, arranged upon a common centre, so located that as the cylinder revolves, the several chambers are brought in succession, in line with the barrel, to be fired. The pistol manufactured by the respondents consisted of a many-chambered cylinder bored entirely through, the calibres being cylindrical instead of conical, and using a cartridge with a flange at the but, and all of the chambers arranged in a circle, and charged at the rear.

The respondents contended, that upon the evidence of the first-named complainant, he had not shown by his account of his experiments that he had, prior to June 16, 1853, — the date of the Hertog and Devos patent, — made an invention, in the sense of the patent law, of the thing claimed by him, in the first claim; and if so, that he subsequently abandoned his invention.

Sufficient attention to this part of the testimony is found in the opinion of the court. The respondents admitted that they had manufactured and sold revolving cylinder pistols, having the chamber bored right through to the rear, so as to be loaded at the rear.

E. W. Stoughton, C. M. Keller, and E. F. Hodges, for complainants.

When a patentee sues for infringement of his invention, and old machines or public descriptions are set up as prior thereto, he has a right to go back, not merely to the time when he reduced his invention to a practical working form, but to the time when he developed it as an intellectual conception, and reduced it to such condition that an artisan could make it from his description. *Philadelphia and Trenton Railroad Co. v. Stimpson*, 14 Pet. 448.

An infringer, in order to defend himself, if he sets up a prior machine, must show that he reduced it to a practical working form; but a patentee, in order to show the date of his invention, is not compelled to make that proof, but may show when the invention was so far completed that the work of the artisan only was requisite to reduce it to practice.

The question of abandonment is always one of intent, to be gathered from the evidence, unless evinced by permitting an invention to be used by the public so long that the court will presume the party intended to abandon it. There is no evidence of abandonment in this case. The respondents cannot say that complainants' invention, which they have used, is a useless one. If it is said that respondents employ the complainants' invention with improvements which make it useful, then this proves that the original invention was useful. *Gray et al. v. James et al.*, Pet. C. C. 394.

B. R. Curtis and Causten Browne, for respondents.

No invention, in the sense of the patent law, was made by the complainant in 1849.

This is a case where an American inventor is endeavoring to make a title against the public, who had come into possession of the thing patented, under a foreign patent, brought into use in this country before the American patent was taken out. In such case it is not enough for the inventor to show that at a prior date he had done something in his own mind, or written it upon paper; he must show that he embodied the invention in practical form. *Johnson v. Root*, ante, p. 108; *Cahoon v. Ring*, 1 Cliff. 592.

The opening of the bores at the rear was not new when used

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by the complainant. The complainants' invention, if there was any, consisted in the application of this system to the many-chambered pistol. The application of an existing device or mode of operation, to an analogous subject, no new means of application being devised, is not the subject of letters-patent, and if new means are devised, then the patent is limited to those means. *Brunton v. Hawkes*, 4 B. & A. 541; *Bean v. Smallwood*, 2 Story, 408; *Horton v. Mahon*, 6 L. T. 289; *Ormson v. Clarke*, 7 L. T. 371; *Brook v. Aston*, 8 El. & Bl. 478.

CLIFFORD, J. Power to grant letters-patent is conferred by law upon the Commissioner of Patents, and when that power is lawfully exercised, and a patent has been duly granted, it is *prima facie* evidence that the patentee is the original and first inventor of that which is therein described and secured to him as his invention. Availing themselves of that rule of law, the complainants introduce the patent granted to Rollin White, and contend, and well contend, that its effect is to cast the burden of proof upon the respondents, to prove the defence set up in the answer. Conceding the rule of law to be as stated, the respondents introduced two foreign patents on which they chiefly rely to establish their defence.

Both of those patents will be examined, but it will be more convenient to reverse the order adopted at the bar, because the complainants admit that the one granted in Belgium to Hertog and Devos, on the 16th of June, 1853, is for the same invention as that embodied in the first claim of the patent on which the suit is founded. Granting that proposition, it is obvious that the suit cannot be maintained, unless it appears that the invention claimed by the complainants was made by the patentee, at some period prior to the date of that patent. Complainants' patent was granted, it will be remembered, on the 3d of April, 1855, long after the date of the foreign patent, and the presumption of originality rising from the granting of the same, only extends back to the time when the application was filed in the Patent Office, which was on the 20th of February in the same year. Unless, therefore, the complainants show that the invention embodied in the patent claimed by them was made and reduced to

practice prior to the 16th of June, 1853, they cannot prevail in the suit, and the burden of proof is shifted upon them, to establish those facts. They do not controvert any of these propositions, but refer to the deposition of the patentee, and insist that his testimony as there exhibited establishes the priority of his invention over that described in the foreign patent under consideration. According to his testimony, he learned the gun-making business of his brother, J. D. White, at Williamstown, in the State of Vermont; and he states that the first firearm he ever saw, so constructed as to be loaded at the breech, was a flint-lock pistol, owned by his father, when he was about ten years of age. His description of the pistol is, that the barrel unscrewed from the breech-pin and received the charge at the rear end, and of course, when the cartridge was placed in position, had to be rescrewed to the breech-pin, before the pistol could be fired. Assuming his statements to be true, he himself first contrived a plan for a repeating pistol in 1837, but he admits that he never constructed a firearm or model on that plan, until he made the illustrative model produced before the commissioner, at the time he gave his deposition in this case. When he made that plan he contemplated, as he represents, extending the bore of the chambers through the breech, for the purpose of loading in the rear of the chamber, and he also states, to the effect, that the charges were to be held in the respective chambers by a leather packing. Inquiry was also made of the witness, what, if anything, was to resist the charge at the rear end, when the pistol was fired, and his answer was, that the chamber in line with the barrel would rest against the pinion that revolved it, and that the pinion, on the plan suggested, would form the breech to the chamber, as the discharge should take place; and he also stated, in answer to a further inquiry, that the plan contemplated communicating the fire for the discharge by means of nipples, to be inserted into the chamber in front of the packing, to be employed to hold the charge in place. Useful as the firearm suggested might have been, if the plan had been carried into effect, and the invention had been completed, still, it is obvious that the mere conception of the improvement by the witness, however perfect

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the idea may have been, and although he actually described the plan to one person, cannot benefit the complainants in this case, because his own testimony shows that he never completed the invention and reduced it to practice, in the form of an operative firearm. Original and first inventors are entitled to the benefits of their inventions, if they reduce them to practice, and seasonably comply with the requirements of the patent law, in procuring letters-patent for the protection of their exclusive rights. While the suggested improvement, however, rests merely in the mind of the originator of the idea, the invention is not completed, within the meaning of the patent law, nor are crude and imperfect experiments sufficient to confer a right to a patent; but in order to constitute an invention, in the sense in which that word is employed in the Patent Act, the party alleged to have produced it, must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form. *Gayler v. Wilder et al.*, 10 How. 498; *Parkhurst v. Kinsman*, 1 Blatchf. 494; Cur. on Pat., § 43. Mere discovery of an improvement does not constitute it the subject-matter of a patent, although the ideas which it involves may be new, but the new set of ideas, in order to become patentable, must be embodied into working machinery and adapted to practical use. *Sickels v. Borden*, Law's Dig. 423, per Nelson, J.

Whoever first perfects a machine and makes it capable of useful operation, says Judge Story, is entitled to a patent, and he accordingly held, in *Reed v. Cutter*, 1 Story, 599, that an imperfect and incomplete invention, resting in mere theory, or in intellectual notion, or in uncertain experiments, and not actually reduced to practice, and embodied in some distinct machinery, apparatus, manufacture, or composition of matter, was not patentable, under the patent laws of the United States. Pursuant to that rule, the same learned judge also held, that he is the first inventor, in the sense of the Patent Act, and entitled to a patent for his invention, who has first perfected and adapted the same to use, and that until the invention is so perfected and adapted to use, it is not patentable under the patent laws. *Washburn v. Gould*, 3 Story, 122; *Woodcock v. Parker et al.*,

1 Gall. 438. Taken as a general rule, no doubt is entertained of the correctness of the proposition as stated, but it must be regarded as subject to the qualification, that he who invents first shall have the prior right, if, as is prescribed in the fifteenth section of the Patent Act, he is using reasonable diligence, in adapting and perfecting the same within the meaning of that provision. *Reed v. Cutter*, 1 Story, 600; *Marshall v. Mee*, Law's Dig. 426, per Dunlap, J.; *Bartholomew v. Sawyer*, Law's Dig. 427, per Ingersoll, J. Careful attention, however, must be paid to other portions of the testimony of this witness. Pistols, with a cluster of barrels revolving on an axis, so that each barrel may in turn be brought into proper line to be fired, were first seen by him, as he states, in 1839, at the shop of his brother in the State of Vermont, where he learned his trade, and he also states that upon seeing it, he suggested to his brother the expediency of cutting off the barrel in front of the breech, for the purpose of loading it in the rear end of the barrel. His statement is, that he made the suggestion in 1839, but there is no evidence that any such experiment was made at the time, or that any attempt was then made to carry the suggestion into effect. The witness subsequently gave some attention to the subject of inventions, and in 1841 a patent was granted to him, for an improvement in looms for weaving bolting cloths. Eight years after the date of his patent, he went to work for Samuel Colt, in the manufacture of repeating firearms. On that occasion, he worked there from February to April, and then left, but he returned again about the 1st of August, in the same year, and continued there engaged in that work, from the time he so returned until December, 1854, when the owner of the establishment ceased to manufacture by contract. When he first went there, he had a contract for turning barrels, under his brothers, and when he returned again, he took another contract under them, for rifling and polishing the barrels, but from April, 1852, to the time he finally left, he worked under a contract with the owner, to manufacture certain parts of the locks. Certain experiments in constructing a pistol, having a rotating cylinder with the chambers bored entirely through, and in the use of it

after it was constructed, were made by the witness, during the period he was at work in that establishment, and in view of their importance in this investigation, they will be separately considered. Before he left the first time, and while he was at work turning barrels, he procured two refuse Colt's cylinders, borrowed a cutting-off tool of an acquaintance, placed them in a lathe that he used for turning the barrels, and cut off the front of one, and the rear of the other, so that the two parts when put together, that is, the front of one and the rear of the other, would make a cylinder of about the usual length. Easily as the alteration was made, still, it is evident that the result effected by it was of very great importance, as it constituted the front part a cylinder of chambers, bored entirely through, so as to admit the charges to be inserted at the rear end, and it, at the same time, constituted the rear part, cut off from the other cylinder a breech to close up the chambers after the cartridges were placed in position. Flanged cartridges were not used by him in that experiment, but he drilled out the rear end of the chamber making it a little larger than it was at the front, for the purpose of holding the ball in position. Drilling out the rear end of the chamber, leaving the front of the same diameter as it was before, had the effect to form a flange in the same, against which the ball would rest when inserted at the end so enlarged, and was designed undoubtedly, to answer the same purpose as the flanged cartridge, or the conical bore of the cylinder which has since been introduced. Circumstantial account is then given of what he subsequently did with the parts so selected, and of the way in which he attached them to the lock frame of a pistol, which he borrowed for the purpose of the experiment, and of the manner in which he loaded and fired the arm so constructed and arranged. When he had completed the parts as described, he carried them to his boarding-house, procured a Colt revolving pistol of a fellow-boarder, took off the barrel and the cylinder, charged one chamber of the cylinder he had prepared, with powder and ball, putting the ball foremost, and inserting the charge into the chamber until the ball came into contact with the flange or shoulder made by the drilling, and then arranged the cylinder

and breech together, as already described, and fastened on the barrel, which completed the arrangement. Desiring to fire it secretly, for reasons which will presently appear, he then went across the street to a neighboring shop, and there made inquiry of the foreman, who was a workman of his acquaintance, whether or not there was a good place in the shop where he could fire his newly constructed pistol. Responsive to that inquiry, he was shown into the basement of the building, and there he arranged the parts of the pistol in proper position, and fired the charge through an open space in the floor, into the water below. Whether the owner of the shop knew that he was there, or not, the witness is not able to state, but the workman who showed him the place knew it, and the witness thinks he was near when the pistol was fired. Regarded as a whole, the experiment, as the witness states, was not satisfactory, because there was so much escape of the flame, that if the other chambers had been charged in the same way, the charges would have ignited. The witness made another experiment about the same time, but with a much better result. He employed on the second occasion the same cylinder and breech as on the first, and he loaded it in the same way, except that he did not quite fill the chamber with powder, leaving sufficient space so that he could put in a packing prepared for the purpose, which consisted of a piece of leather fitted to the bore of the chamber, and inserted behind the powder, and made with a central conical hole, larger on the inside than the outside, and which it was supposed would be so expanded by the discharge, as to prevent the escape of the flame at the rear. Having perfected the leather packing, and put the pistol in order for use, he went to the same shop as before, and fired it again in the basement of the building, and he states, without qualification, that the packing stopped the escape of the flame, and that he was satisfied with the experiment. Both of these experiments were made while the witness was engaged in turning pistol barrels in the establishment of Samuel Colt, and before he left there the first time. Subsequent to that time, and after he came back in the month of August, in the same year, he made a third experiment. Whether he took the same breech, or another with

a ratchet on it, so that it could be turned by the machinery of the lock, is immaterial in this investigation, as in all other particulars they were substantially the same, so far at least as respects the questions involved in this controversy. Attention to what he did on the occasion, will show that the experiment was one of very great importance. First, he loaded all the chambers with powder and balls, nearly filling the chambers with loose powder, and putting in the leather packing, as described in the preceding experiment, and he states that each chamber had its nipple and that all were capped ; secondly, having loaded all the chambers of the cylinder and adjusted the breech to the same, he again borrowed a Colt's pistol, either of the same person or of his brother, took off the barrel and cylinder, as he had done before and attached the loaded cylinder, together with the breech, to the lock frame, as before explained, and put the same in order for use ; thirdly, he then proceeded to the same shop, and there, in the basement of the building, fired and discharged all of the chambers, one after another ; and he states that the pistol operated well and to his satisfaction, and that it was seen by one of the workmen in the shop, and by one of his brothers. His fourth experiment was indubitably made with a Colt's cylinder, having the ratchet arrangement on it, and its importance consists, not only in the improvements made, both in the cylinder and the breech, but also in the fact that the witness successfully repeated all that he had accomplished in the preceding experiment. Employing the language of the witness, his statement is, that " he drilled the breech the size of the chamber " through to the recess cut for the shoulder of the nipple, and then he borrowed an arbor, put the cylinder into it, and turned off the rear part of the same below the centre, so that he could insert a cartridge in the rear. Particular attention should also be given to the several improvements made in the breech and its attachments or connections, and in the general arrangement of the arm. Adopting the same course as on the former occasion, he procured another refuse cylinder that had the central hole in it, cut off the rear end of it as he had done before, drilled the hole larger, so that it would slide on to the rear part of the cylinder he had just

prepared for the experiment, and in that manner formed the breech, and having arranged the breech, he drilled a hole and inserted a nipple, and then attached the cylinder to the lock-frame, marking it by the frame, so that he could make it correspond with the recess in the lock-frame for the purpose of capping the nipple; and he states, in respect to this experiment, that he so constructed the pistol that he could load it in the rear without removing the cylinder from the lock-frame. Constructed and arranged as described, he loaded the pistol, using packing to stop the escape of the flame, and went to the same shop and fired it; and he states that it operated satisfactorily, as it could hardly fail to do, as it was obviously precisely such an arm as that described in the patent on which the suit is founded. Doubt cannot be entertained that the pistol, as described, was a complete arm; that the cylinder of chambers could be turned in front of a stationary breech by the mechanism of the lock, and that the several chambers of the cylinder could be brought in succession to the line of the barrel to be fired; and it is equally clear that it was so constructed and arranged, that the charges could be inserted in the rear of the chamber, without removing the cylinder. Precise dates are not given, in respect to any of these experiments, but the proof is, as already exhibited, that they commenced as early as March or April, 1849, and that the one last mentioned was made during the latter part of that year or the early part of the year 1850. During the next year he made a fifth experiment, with a view to use Sharp's cartridges, with a cylinder like the one he had contrived, and, to make the trial, he took the same pistol used in the preceding experiment, or one like it; but a portion of the recoil-shield was cut away, so as to let the cartridge project out of the rear, leaving a shoulder on the recoil-shield near the nipple, and the arrangement was such, that a knife projected over, and coming in contact with the cartridge, would cut it off at the rear end, so that when it came in line of the barrel, it would be ignited. Loading one chamber only, he could fire it with safety, under that arrangement; but when the series of chambers were loaded, he found that upon firing it, three or four went off at the same time, and the result was that the experi-

ment was not satisfactory. All of these experiments, it will be remembered, were made by the witness while he was in the employment of Samuel Colt, and during the period when his employer was in the full enjoyment of his patent for his revolving pistol. Contracts held by him, or his brothers, gave him a profitable business, and he could not afford to relinquish it; and if he could, and had done so, it would have availed him little or nothing, as his invention was only an improvement upon that of his employer. Fear of losing employment, and perhaps the dread of prospective litigation, deterred him from any attempt to secure a patent, and so he continued assiduously to fulfil his contracts, and occasionally to prosecute his experiments. Failing to adapt the arm he had invented to the use of the particular cartridge mentioned, his next effort was, to see if he could not construct a joint between the breech-plate and the rear end of the cylinder, sufficiently close by the contact of the metal surfaces, to prevent the escape of the flame when the pistol was fired, without the necessity of using the leather packing, or any other equivalent means to confine the powder within the chambers; and with a view to determine that matter, he, in the year 1852, made a sixth experiment, which is the last to be particularly noticed in this investigation. Commencing, as before, he procured two cylinders of the same kind, cut off the front of one, to be used as such, and the rear of the other, to be used as a breech, brazed a plate over the nipples of the latter, so as to make the surface smooth, and fitted the part used as a cylinder, and the breech, together as closely as he could, and have the arm the proper length to revolve in the lock-frame. What he was endeavoring to accomplish was, to make the joint so tight, that upon firing the pistol, the flame would not escape from one chamber to the others; and having perfected the arrangement as well as he could, he loaded the pistol, placed it in the lock-frame and fired it, but the result was, that he found he could not prevent the escape of the flame in that way. Abandoning that idea as hopeless, he mentioned the failure to his brother, and told him what the result had been, and his brother inquired of him, if he was sure he could accomplish the desired result by the use of the

leather packing, and he, the witness, told his brother that he was, and to satisfy him that he could do so, he loaded the pistol, using the leather packing, and fired it, and carried the breech to the shop and exhibited it to his brother for his satisfaction. No appearance of any escape of flame or smoke could be seen, as the witness states, except what appeared in the hole of the leather packing, where the fire from the cap communicated with the charge. The witness exhibited the breech, used by him on that occasion, before the commissioner, when he gave his deposition, and its identity is fully established by the testimony, and it is also fully proved that the same cylinder was preserved and used by him in constructing his model for the Patent Office. Much testimony was introduced by the complainants, to confirm the testimony of the patentee, in relation to these several experiments, but it will be sufficient to say, without reproducing the testimony, that I am of the opinion that his statements are correct, and that no one of them, which is of any importance in this investigation, has been successfully contradicted. Taking the statements as true, they show that the patentee made the invention described in the first claim of the patent, and reduced it to practice as an operative firearm, within the meaning of the patent law, as early as the fall of 1849 or the early part of the year 1852, when his fourth experiment was completed.

Suppose it to be so, still, it is insisted by the respondents that the supposed inventor afterwards deserted and abandoned his invention, and consequently, that he cannot be regarded in this controversy as the original and first inventor of the improvement. But if that proposition cannot be sustained, then they contend that the proofs show that he took the pistol he constructed apart, and laid the materials aside for years, as something incomplete and requiring more thought and experiment, before he attempted to restore the invention, and without any definite intention of resuming the undertaking; and they insist that the rule of law, upon that state of the case is, that if another, in the mean time, invents the same thing, without any knowledge of that which is so suspended, and reduces the same to practice, applies for and takes out his patent, and introduces

the patented invention into public use, he is entitled to the benefits of his skill and diligence, and must, in judgment of law, be regarded as the original and first inventor of the improvement, although it may appear that the final experiment of the other party, was so far completed that the machine or other invention, was in fact, the proper subject of a patent, and that the materials were laid aside to preserve the parts, to be used or not, in the future, as circumstances should arise, or as he should thereafter determine, yet without any positive, unconditional intention of relinquishing what he had accomplished, or of abandoning the invention. Nothing need be remarked in respect to the first of these propositions, except to say that the evidence in the case is not sufficient to support it, and it is accordingly overruled. Unlike the first, the second deserves to be more carefully considered. Cases undoubtedly occur, such as are supposed in the proposition, where an individual employed in inventing, or in making experiments in that behalf, feeling dissatisfied with the result of his efforts, becomes discouraged in prosecuting the investigation, and finally loses all confidence in the prospect of his ultimate success, and under the influence of such discouragements, or from a desire to engage in more profitable business, or to pursue a more pressing or favorite undertaking, decides to break up what he has accomplished, and lays the parts aside, not positively intending to abandon the subject, yet wholly uncertain whether he will ever resume it or make any further use of the parts so laid aside. Such cases are doubtless of frequent occurrence, and while they do not show an unconditional abandonment of the undertaking, they do show an indefinite suspension of the same, and an entire uncertainty during such suspension, whether the interested party will ever furnish the invention to the public. Where an invention is thus voluntarily broken up and laid aside, without any controlling impediment in the way of an application for a patent, and under all the other conditions specified in the preceding proposition, and another, in the mean time, invents the same thing, without any knowledge of that which is so suspended, and reduces the same to practice, applies for and takes out his patent, and introduces the patented invention into public

use, I am of the opinion that he must be regarded as the original and first inventor of the improvement. The federal courts have everywhere held that an inventor, who has first actually perfected his invention, will not, if he has exercised good faith, be deemed to have surreptitiously or unjustly obtained a patent, for that which was in fact first invented by another, unless the latter was at the time using due diligence in adapting and perfecting what he had accomplished; and it was expressly held in *Ransom v. The Mayor of New York*, Law's Dig. App. 72, per Hall, J., that if a person does not use due diligence in perfecting his invention after he has conceived the idea, and another conceives the same idea and perfects it, and secures his patent and applies it to use, the latter will be considered as the original and first inventor, and that a patent granted to the former will be void. See *Reed v. Cutter*, 1 Story, 599.

But the question to be decided in this controversy is, whether the proofs exhibited in the record bring this case within the operation of that rule of law. Some of the parts used in the several experiments, to which reference has been made, were preserved, as, for example, the revolving breech, constructed with the nipples in it, as used in the sixth experiment, and it is an exhibit in the case, and the cylinder used in the same experiment, and several others of the identical parts used in those experiments, were also preserved, and put into one or the other of his Patent Office models.

Most or all of the other parts were put into a box, and were kept for a time in the attic of the house where he lived; and he states that when he moved from there, in shipping his goods, he lost the box, together with the materials, and it is upon the loss of these materials and the delay that ensued in applying for a patent, that the respondents chiefly rely to support the theory of fact involved in the proposition. On the other hand, it undeniably appears that the invention held by the complainants is only an improvement upon the patented invention of Samuel Colt, who for a long series of years was an extensive and successful manufacturer of revolving pistols. Full proof also is exhibited that the patentee of the invention, under whom the complainants

hold, was in the employment of that same manufacturer, from the time he made his first experiment, until he commenced to make his preparations with a view to apply for his patent; and that throughout that entire period, the well-known patent of his employer was in full operation. Direct inquiry was made of the patentee in this case, why it was that his application for a patent was so long delayed, and his answer was, that it was because his employer had a patent for the mode of revolving the pistol embraced in his improvement, and which he desired to use, and also because his employer had discharged certain men who had been experimenting on revolving pistols. Two or more of his brothers were employed in the same establishment, and on one or more occasions, when the witness exhibited his pistol to his brothers, he proposed to show the same to his and their employer, but they objected and remonstrated against the suggestion, upon the ground that if it were done, they would all lose their places. Meeting with these discouragements, he delayed his application for a patent; but there is no ground whatever to conclude that he ever, for a moment, intended to postpone his application for a patent any longer than it became necessary that he should do so, in order to overcome those difficulties, and consequently the theory of fact involved in the proposition cannot be sustained. Mention has not been made of the patent of John H. Johnson, of the 17th of April, 1854, because it is subsequent in date to the other foreign patent, and of course must fall within the same category.

Examination must also be made of the Lefauchaux patent, of the 2d of May, 1845, and also of a subsequent patent granted to the same person, as set forth in the certificate of addition, of the 7th of February of the following year. Both of these patents, it will be observed, are prior to the date of the invention embodied in the patent on which the suit is founded, but reference will only be made to the one first granted, as the means of explaining the invention described in the second, as it is not pretended that the first is of a character to supersede the invention held by the complainants. Parties agree, substantially, as to what the state of the art was at the time when the foreign patent under consideration was granted.

Prior to that invention, there were two classes of firearms which were well known and in extensive use. First, there was the pistol, sometimes called the pepper-box pistol, which was largely manufactured in foreign countries, and by Ethan Allen in the United States. When first introduced, it consisted, as usually constructed, of an aggregation of five or six barrels, which were formed by boring the several calibres in a solid block of metal, and the whole series were arranged in a circle about a central hole, fitted to a spindle projecting from a shield-plate, and of course, they could only be loaded at the muzzle, as the bore of the barrels did not quite extend to the other end of the block, which was unperforated, and left solid to serve as the breech of the firearm. Improvements were made in that pistol, and patents were granted for those improvements, but they all had too much weight for a portable arm, and were more or less difficult of accurate aim, on account of the excess of weight at the muzzle, as compared with the ordinary pistol, and the consequent tendency to lower the muzzle in pulling the trigger. Following those improvements, came the invention of Samuel Colt, which all admit was an improvement of great value. Instead of a cluster of rotating barrels, he provided a single barrel, which was connected with the handle of the stock, as in the ordinary pistol, and in addition to the barrel, there was a cylinder of chambers, whose front end was joined to the barrel, and which were arranged upon a common centre, and so located, that, as the cylinder was turned, the several chambers were in succession brought in line with the barrel to be fired. Certain defects, however, always existed in that arm, and among the number, was the want of efficient means to control or overcome the tendency of the recoil of the arm, when fired, to cause the remaining cartridges to protrude from the front of the cylinder, and whenever that happened, it would prevent the cylinder from revolving, so as to bring the next charge into the proper position. No remedy for that difficulty was shown in the patent, except that of ramming the cartridges in tight, and experience showed that the remedy was not always adequate to accomplish the purpose for which it was suggested. Such was the state of the art, as shown in this case, when Lefau-

cheux obtained his first patent "for arrangements of breech-loading pistols." According to his description of his invention, he forged the barrel of the pistol with a socket, having a cylindrical hole parallel to the bore of the barrel. By that socket, the barrel was united to the body of the pistol, by means of a fixed stem or arbor, which had a screw cut on its end, and which passed through the whole length of the socket, and bore on its end the thread of a screw, to receive a nut, by which the barrel was held more or less tight; and the patentee states that it is only necessary to turn this nut slightly to the right or left, in order to fasten the barrel in its place or separate it from its connections, as circumstances may require; and he also describes the device, on one side of the lock-plate, which is designed to stop the barrel at the proper point, when turned on the arbor to be loaded, in order that it may be brought back, after it is charged, to its original position, to be ready to be fired. Loading was accomplished, as described, by swinging the barrel laterally so as to expose the rear end, and when the arm is charged, it is then brought back to its original position, so that the rear end may be closed by the breech-plate. Important improvements were made in that invention, as appears by the description given of the same, in the specification of the certificate of addition, to which reference has already been made. Remark should be made in the outset, in recurring to the last-named invention, that the patentee, at the commencement of the specification, refers to the prior patent as the foundation of his improvement, and, throughout the description, proceeds upon the ground, that what is embodied in the certificate of addition, is a modification or improvement upon the invention described in the original patent.

In the introductory part of the description, he characterizes his former invention as "a system for pistols with one barrel," and his statement is, that the new modification or improvement relates to pistols with several barrels, and there is no mention whatever made of pistols composed of a cylinder of chambers, united with a single barrel, and arranged upon a common centre, and so located that, as the cylinder is turned, the several

chambers are, in succession, brought in line with the barrel to be fired. Such a pistol is nowhere mentioned, described, suggested, or indicated in any part of the patent, unless it be assumed that the chambers of such a cylinder are the barrels of the pistol, and consequently that a pistol composed of a cylinder, although united to one barrel only, as described, is nevertheless in the sense of the patent law, a pistol of as many barrels as there are chambers in the cylinder. All will agree, I think, that the patentee, when he framed the specification of his original patent, took no such view of the subject. On the contrary, it is clear, that when he stated that the invention was applicable to pistols with one barrel, he referred to the form of the barrel, as exhibited in the ordinary pistol, except that it was open at the rear as well as the front end, and there is no solid ground for a different conclusion in respect to the invention embodied in the certificate of addition. Much attention, says the patentee, has been given to different plans of muskets, and especially of pistols, having several barrels that can revolve about a central axis, as fast as they are successively discharged. Firearms of the description mentioned afford, as he states, the advantage of making it easy to fire as many times as the arm has barrels, without any interruption, but in his view, they also presented disadvantages which it becomes important to notice. He states that in order to make use of them it was necessary to "unscrew each of the barrels, one after another, then load them, prime them, and screw them on again, each one in its respective place." His new mode of construction was invented to overcome those inconveniences; and he states that it is applicable to all the plans devised for these kind of arms with movable barrels, whether the cartridge does or does not carry the priming on it. Having made these several explanations, he then proceeds to describe the invention, and among other things says, my invention consists simply "in uniting all the barrels against a single plate or disk, having a central axis, and in confining all these barrels by a single screw, which, while it holds them upon the axis, allows them to turn around it in succession, as fast as the discharges take place. Stopping there, it would not only be impossible to sustain the

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view of the respondents, but it would be impossible to entertain any doubt as to the true construction of the patent. But the description does not stop there, and what creates the difficulty is, that there is no translation in the record which is known to be authentic. Respondents presented one, but the complainants insist that it is erroneous, and one or more of their expert witnesses have so testified. Taking the passage in question as translated, the patentee is made to say that the new arrangement is applicable, with the same ease, to all the mechanisms belonging to pistols with several barrels, as well as in general, to the different breech-loading firearms. Breech-loading is the phrase in dispute, and the original words are "*se chargeants par la culasse.*" Complainants' experts, one or more of them, testify that the phrase in our language should be, "loading at the breech," instead of "breech-loading," as rendered in the translation. Embarrassment certainly arises in determining the question, but there are some considerations affecting it which are plain and undeniable. First, the translation presented by the complainants is more literal than that assumed by the respondents, as is obvious, even to one but slightly acquainted with the language. Secondly, the question should be examined in view of the other parts of the instrument which are not involved in any doubt. Thirdly, recurrence should be made to the nature of the invention, in order to ascertain whether it is really applicable to the firearms involved in this controversy. Fourthly, if it be found that one of the translations is repugnant to other parts of the instrument, and the other is consistent with the other parts, it will be safe, under the circumstances, to adopt the latter, as expressing the real intention of the patentee. Guided by these rules, reference is again made to the description of the invention, which consists, as stated in the specification, simply in uniting all the barrels against a single plate or disk, having a central axis, and in confining all these barrels by a single screw, which, while it held them upon the axis, allowed them to turn as before explained. Looking at that description of the invention, it is obvious that the phrase, "*se chargeants par la culasse,*" if it be construed to include such firearms as that of Samuel Colt, is

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inconsistent with other parts of the instrument, and incompatible with the nature of the invention, because it cannot be so applied, without borrowing the improvement held by the complainants, which is nowhere described in the certificate of addition. In view of the whole evidence bearing upon the question, I am of the opinion that Rollin White is the original and first inventor of the improvement described in the patent, on which this suit is founded, so far as respects the first claim of the patent, which is the only one involved in the controversy. Several other defences were presented at the argument, but it will be sufficient to say that none of them can be sustained, and they are accordingly overruled. Nothing need be added upon the subject of infringement, as it is virtually admitted in the pleadings and fully proved. The complainants are entitled to an account, and when the amount is ascertained, a perpetual injunction will be granted.

ELIAS HOWE v. CHARLES W. WILLIAMS.

In an equity suit, a motion that all proceedings be stayed, and that complainant be required to bring an action at law, or else that issues be framed for a jury, is sometimes granted where the originality of the invention is doubtful, or where the controversy chiefly depends upon disputed questions of fact; but where the invention is of long standing, and the inventor has had exclusive possession under it, the motion is seldom received with favor.

Such motion ought not in general to be granted, where it appears that a hearing in equity and a trial at law have already been had, and that both resulted in favor of the complainant.

Where matters pleaded in the answer are in avoidance of the claim of the complainant, such allegations are not evidence, but must be proved, and the burden of proof is upon the respondent.

The defence of abandonment, and acquiescence in the manufacture and sale of the invention by the complainant, cannot be sustained without proof of knowledge on the part of the complainant of such use and sale, nor has the respondent, without proof of such knowledge by the complainant, any grounds to believe that the manufacture and sale of complainant's invention would not by him be deemed an infringement.

If the complainant, in his original patent, fails to make claim for a certain portion of his invention described in the specification, he cannot, under such original patent, maintain suit against any person for the use of such portion or device, but he may reissue and correct the deficiency, and then enforce his right to such omitted portion.

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It is no defence to a corrected and reissued patent that the respondent had used the invention with impunity before the patent was amended.

Comparison of complainant's and respondent's machines in this case.

If different devices, or devices differing in form and having different names from those in the complainant's machine, are used in that of the respondent, but the plan or idea, the arrangement, combination, and result are the same, and if the functions performed by the one are also performed by the other, then the two devices or sets of devices are equivalents.

BILL in equity for the infringement of certain letters-patent on a sewing-machine, and praying for an account and an injunction. The bill of complaint, filed on the 9th of August, 1859, was founded on original letters-patent dated the 10th of September, 1846. As originally granted the patent would have expired on the 10th of September, 1860, but an extension was obtained on the same for seven years, and on the 7th of September, 1860, a supplemental bill was filed setting forth the extension. Subsequently the patent was surrendered, and a reissue obtained, dated the 19th of March, 1861. This was also set forth by supplemental bill filed the 12th of April, 1861. In his answer to the supplemental bill, the respondent alleged that after filing his answer to the original bill he had obtained letters-patent of the United States for an improvement in sewing-machines, invented by him, and which was used in the machines sold by him.

The principal defences were, first, that the complainant was not the original and first inventor of his supposed improvement; and second, that if he was, the respondent had not infringed the same. The respondent first submitted a motion to the court that an order be passed, directing all the proceedings in the court to be stayed, and that the complainant be required to bring an action at law to determine the several matters involved in the suit, or that it be ordered that issues for a jury to settle the same be framed under the direction of the court. Upon the motion, the court said: "Such a motion is sometimes granted, where the patent is recent, and where the case shows that the originality of the invention is doubtful, or where the merits of the controversy chiefly depend upon contradictory evidence, involving the credibility of witnesses; but where the patent is of long standing, and the inventor has had an exclusive possession

under it, the motion is seldom received with any favor. *Washburn et al. v. Gould*, 3 Story, 169; *Hill v. Thompson*, 3 Meriv. 622; *Collard v. Allison*, 4 Mylne & Cr. 487. Other examples, where such a motion was granted, are also shown in some of the numerous cases cited by the respondent, but it is a sufficient answer to all such decisions, as applied to this case, to say that the motion ought not in general to be granted where it appears, that a trial at law and a hearing in equity have already been had, and that both have resulted in favor of the complainant; and the motion is accordingly overruled. *Goodyear v. Day*, 2 Wall. Jr. 296."

Several patented machines were introduced by the respondent as showing that the complainant was not the original and first inventor of what he claimed in his specification, namely, the machine of J. J. Greenough, patented the 21st of February, 1842, that of G. H. Corliss, patented the 27th of December, 1843, and that of B. W. Bean, patented the 4th of March, 1843.

The above-named were American patents. Two English patents, one to Martin and Archbold, the 4th of May, 1844, another to Foster and Gibbon, the 7th of December, 1844, and one French patent to Thimonier, dated the 17th of July, 1830, were also introduced. A particular description of these is to be found in the opinion of the court.

The following were the claims of the complainant's reissued patent: —

First. A sewing-machine, constructed and operating to form a seam, substantially as described.

Second. The combination of a needle and a shuttle or equivalent, and holding surfaces, constructed and operating substantially as described.

Third. The combination of holding surfaces, with a baster-plate or equivalent, constructed and operating substantially as described.

Fourth. A lifting-rod, a clipping-lever, and a receiving-pin, respectively, each constructed and operating to control the threads, substantially as described.

Fifth. A baster-plate, constructed and operated substantially as described.

Sixth. Holding surfaces constructed and operating substantially as described.

Seventh. A grooved and eye-pointed needle, constructed and adapted for rapid machine sewing, substantially as described.

Eighth. A side-pointed shuttle, constructed and operating substantially as described.

B. R. Curtis and *Causten Browne*, for complainant.

It is not enough that the patenting abroad should take place before the application of the American patentee. It must be before his invention. *Sprague, J., in Howe v. Williams, March, 1860; Bartholomew v. Sawyer, Ingersoll, J.*

Nor is it enough that the English patent should have been sealed, but it must appear that the specification was enrolled, before the American patentee makes his invention, in order to defeat his patent.

Caleb Cushing and *A. C. Washburn*, for respondent.

CLIFFORD, J. The primary inquiry is, whether the complainant is the original and first inventor of the improvement described in the specification and claims of his reissued letters-patent. Referring to the concluding part of the specification, it will be seen that the claims are eight in number, and it is proper to remark that they are so plainly and explicitly expressed that they cannot be regarded as of doubtful construction. They are all, in fact, substantially included in the first of the series, which reads as follows: First a sewing-machine, constructed and operating to form a seam substantially as described. Particular description is also given in the specification, not only of the mode in which the machine operates, but also of the several devices or elements of which it is composed, and those several devices or elements, when taken as an organized whole, constitute the invention specified in the first claim of the reissued patent. Those devices, as set forth in the specification, are divided into three classes, and when so classified they constitute a mechanism for manipulating the threads, or an apparatus for stitching, and an apparatus for holding the cloth during that process, and an apparatus for feeding the cloth operating in the same connection, and all acting in combination to form the seam. Separately con-

sidered, the mechanism for manipulating the threads consists of an eye-pointed reciprocating needle constructed with a groove so as to protect the threads in the rapid movement through the cloth, and a shuttle or its equivalent, for detaining and interlocking the loops of thread passed through the cloth by the needle, to which must also be added the lifting-rod and clipping-lever, and the receiving-pin, which may be regarded as appliances for controlling the threads, and for making tension on the same, so that each stitch may be drawn tight by the operation of the machine. Certain opposing local surfaces, as described in the specification, constitute the holding apparatus, consisting of the shuttle-box, or one side of it, and of a certain metallic plate, whose upper end, as therein described, is attached to the frame of the machine. Means are also described for adjusting those two local surfaces to the thickness of the material to be sewed, showing conclusively that they are designed to press upon the cloth or other material, in the operation of the machine, and perform the functions of holding devices. Those opposing surfaces sustain the cloth during the operation of stitching, holding it in position against the thrust and retraction of the needle, but they are so adjusted, or may be, that the pressure and retention are not sufficient to prevent the feeding of the cloth, for the purpose of spacing the succeeding stitch, preparatory to another corresponding perforation of the needle. They so operate as to make the pressure upon the cloth near the point of sewing, leaving the other parts of the same comparatively free, and they also serve to guide the cloth, so that it may be fed in a determined plane, and confining the same in the proper locality, so that the stitch may be drawn tight. Briefly described, the feeding apparatus consists of a metallic plate, supplied with projecting teeth, which take hold of the cloth, and are designed to answer somewhat the ordinary purposes of basting, and the plate is also furnished with a row of small holes, drilled, at regular distance from each other, answering the purpose of rack-teeth, so that the plate, as the stitch is taken, may be moved forward between the two stationary holding surfaces, by means of a pinion, which enables the operator to regulate the length of the stitches at pleasure. Explana-

tions, to show that the feed is automatic and intermittent, are unnecessary, and held, as the cloth is, between those two local surfaces, during the forward movement of the metallic plate, it is evident that those devices aid in keeping the cloth in place while the feeding is accomplished, and consequently they must also be regarded as a component part of the feeding apparatus, to the extent that they modify the action of the feeding instrument. Two threads are employed in forming the seam, as described in the specification. One is carried through the cloth by the eye-pointed needle, and forms the loop through which the shuttle passes that carries the other thread. When the shuttle is returned, which is accomplished by means of a device called the shuttle-driver, the thread that was carried by the needle, is surrounded by that received from the shuttle, and as the needle is drawn out, it forces the shuttle thread into the body of the cloth, forming a seam which has the same appearance on each side of the cloth, with this peculiarity, that the thread shown on the one side is exclusively that which was given out by the needle, while the thread seen on the other side is exclusively that given out by the shuttle. Such is the general description of the principal devices of the machine described in the specification, and their arrangement and mode of operation. Reference is specially made in the first claim of the patent to the description given in the specification, and of course the several parts of the instrument must be construed together. Like other sewing-machines in use at the present time, the one described in the patent of the complainant is composed of various devices, but the claim is for the organized machine, as an existing whole, and not merely for some or all of the separate devices of which it is composed, or for some or all of those devices as a mere technical combination. Undoubtedly the several devices operate in combination, and consequently the invention itself consists, in a certain sense, of a combination of those various elements, so constructed and moulded into harmonious action as to accomplish the described result, but still the invention is not a technical combination of old devices where, in order to maintain an infringement it is necessary to show that the respondent has pirated the whole.

On the contrary, the claim under consideration obviously is, that the complainant is the original and first inventor of the organized sewing-machine, whose several devices are described in the specification, when viewed as an existing whole, and operating to accomplish the described result. Seven other claims, numbered from two to eight inclusive, are also made by the complainant, but having come to the conclusion that the first claim, when properly construed, is for the organized machine as an existing whole, it will not be necessary to enter into any very minute explanations of the other claims. They are substantially as follows: secondly, for the combination of the needle and the shuttle or equivalent, and the holding surfaces; thirdly, for the combination of the holding surfaces with the baster-plate, which is the metallic plate already described; fourthly, for the lifting-rod, clipping-lever and receiving-pin, constructed and operating to control the threads substantially as described; fifthly, for the baster-plate, as constructed and operating. Before proceeding with the enumeration, however, it should be remarked that the complainant does not claim damages in this suit for the infringement of the several devices mentioned in the fourth and fifth claim of his patent, except so far as they constitute parts of the general plan, and enter into the general organization of the machine, and co-operate with other parts to produce the result. Sixthly, the claim is for the holding surfaces; seventhly, for the grooved and eye-pointed needle; and eighthly, for the shuttle, called a side-pointed shuttle, constructed and operating substantially as described in the specification. Attention, for the present, however, will be confined to the first claim, not only because it presents the great question in the case, but also for the reason that if the question there presented is decided in favor of the complainant, a particular examination of the other claims is unnecessary.

It is insisted by the complainant that the essential parts, combination and mode of operation of his machine as organized, are new, and that, in fact, he is the original and first inventor of the same when viewed as an organized whole. But the respondent denies that proposition, and insists that several organized machines

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for sewing, both foreign and American, had been invented and patented, before the invention under consideration was made by the complainant. Full proof is exhibited that the complainant invented the sewing-machine described in his specification, or "was employed in inventing and making it about the first of December, 1844," and it is undeniably proved that the machine was "finished, and in working order, so as to sew firm seams, as early as the middle of May" in the following year. Two suits of clothes were sewed by the machine, so made, about the middle of July, in the same year, and the testimony is, that they wore as well as any hand sewing. Witnesses were examined, who identify the machine, and it was exhibited at the hearing, and operated by the complainant, in the presence of the court. Whatever differences of opinion there may be as to the merits of the controversy, all must agree, I think, that the machine in question, although it was made nearly twenty years ago, compares favorably with the best-constructed models of the present time, and that it reflects great credit upon the maker, as a specimen of mechanical ingenuity and skill. Respondent does not deny that the complainant constructed the machine exhibited, and the clear inference from all the evidence is, that he did so without the slightest knowledge of any one of the machines set up in the answer, as superseding his invention. Assuming the fact to be so, then clearly the complainant is the inventor of the improvement described in his specification, and the only question on this branch of the case is, whether he is the original and first inventor of the same. Most of the machines set up in the answer have been under consideration in the courts, and on one occasion, at least, where the subject-matter in contest was substantially the same as that involved in this suit. And whenever the subject has been considered the decision has uniformly been, that no one of those machines is of a character to supersede the invention of the complainant. Considering them in the order mentioned in the answer of the respondent, they are as follows: [The court here referred to the patents mentioned in the statement.] Both parties concede that the machines of Greenough and Corliss, so far as they apply to the issue involved in this case, are substantially

alike, and consequently they may be considered together. Particular examination of the separate devices of those machines will not be necessary, as it is evident that their construction, design, and mode of operation, are substantially different from the machine of the complainant, which will sufficiently appear from a general view of the machines. Obviously they were invented and designed to form the stitch of the harness-maker, composed of two threads which pass through the material to be sewed at each stitch, and in opposite directions, and they have no shuttle or equivalent device. Holes are first made in the cloth or other material by pincers, and the threads are then carried through those holes by a double-pointed needle, grooved each way on both sides near the eye. Eye-pointed needles, such as are exhibited in the complainant's machine, pass only so much of the thread through the cloth as is necessary to form the loop; but the double-pointed needle shown in the other machines pass the entire needleful of thread through the cloth, and must do so in order to form and tighten the stitch, and in opposite directions, so that there can be no interlocking of the threads, as in the machine of the complainant. They employ two threads, it is true, but each thread acts independently, and has the precise same effect as it would have if used without the other. And they have no stationary holding surfaces operating, as in the machine of the complainant, to press upon and hold the cloth in the immediate vicinity of the stitching, leaving the residue of the same comparatively free to be governed and controlled by the hand of the operator. Clamps, instead of stationary holding surfaces, are employed in these machines to hold the material to be sewed, and it is fed forward for a succeeding stitch by a ratchet movement of the clamps in which it is so held. Other particulars might be pointed out in which the machines under consideration are different from that of the complainant, but those already suggested are sufficient, I think, to show that they cannot be regarded as superseding the complainant's patent.

Reliance is also placed by the respondent upon the machine of B. W. Bean, as supporting this ground of defence; but even a cursory examination of the description of it, as contained in

the specification, will clearly show that the machine cannot avail the respondent for any such purpose. Devices, called cog-wheels, combined with other devices, called gear-wheels, are employed to crimp the cloth preparatory to the making of what the inventor calls the running stitch, and they also serve to hold the cloth ; and after the same is crimped to force it upon a stationary needle, causing it to pass through the folds or corrugations of the cloth, so that when it is afterwards drawn out it exhibits on both sides of it a basting or gathering seam. Such is a general description of the operation of the machine and some of its principal devices. Taken as a whole it bears little or no resemblance to the machine of the complainant, except that it has a mechanism for holding and feeding the cloth, and one for making a stitch ; but all of the principal devices, as well as the stitch and seam, are very materially different, and so much so that the machine can hardly be regarded as a sewing-machine, within the meaning of that term as employed in the patent of the complainant. Regarded as a basting-machine, it may have been of some commercial value ; but it is quite obvious that it cannot in any point of view have the effect to maintain the defence set up by the respondent.

Examination must also be made of the foreign machines set up in the answer, of which the machine of Newton and Archbold is the one first mentioned. They describe the subject-matter of their patent as an "invention of improvements in producing ornamental or tambour work in the manufacture of gloves," and evidence is wholly wanting to show that the machine was ever used for any other purpose. Ornament, such as the machine is designed to accomplish, consists of rows of loops or chain stitches on the back of the glove, or of the cut out material fitted to make that part of the glove. Patentees express a decided preference that the gloves should be made before the ornamenting is attempted, but suggest that it may also be accomplished on the cut out material before the glove is manufactured, leaving it clearly to be inferred that the sewing of the gloves is not to be performed with the machine, according to the description. Clamps are used by the inventors, to hold the material, and the

feeding of the same is accomplished by moving the frame of the clamps in which the material is held. Certain modifications are suggested in the specification, and in one of them a bent wire is mentioned as a device pressing upon the material of the glove to prevent it from being forced up by the needles, but the suggestion does not embrace any holding-surface opposite the wire, and consequently the machine, if so modified, would still be without the stationary holding surfaces found in the machine of the complainant. Machines constructed according to the specification have seventy-two needles arranged, in gangs of six upon twelve vibrating levers, and they are so constructed, or intended to be so constructed, as simultaneously to lay a number of rows of the ornamental loops or stitches. Slots are constructed in the clamps in which the glove or the material for the back of the glove is placed, and the needles are worked through those slots so that seams such as are usually made in garments, apparently could not be made without essential modification of the clamps, or other devices of the machine. Single threads are used, that is, one thread to each needle, and there is no shuttle or equivalent, nor any apparatus described or suggested for tightening the stitches of the seam. Superadded to all these differences, it should also be remarked, that there is no interlocking of the stitches, as in the machine of the complainant, and cannot be under the present construction of the machine, because single threads are used, and there is no shuttle or equivalent device. Such a machine is doubtless of some value when it is employed to accomplish the special purpose for which the invention was made, but it is plainly not of a character to supersede the sewing-machine invented by the complainant when viewed as an existing whole.

Pursuing the order already indicated, the next machine to be considered is that of Fisher and Gibbon, which, as described by the patentees, is an invention of certain improvements in the manufacture of figured or ornamental lace, or net, or other fabrics. Two forms of the invention are described in the specification, but it is the second which more especially comes under revision in this case. Confining attention to the latter, it is clear

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that the design of the machine was to embroider or ornament lace, muslin, or other fabric of similar texture, with gimp or cord. The inventors use two threads to accomplish the work, but the gimp or cord constitutes one of the threads and the principal ingredient of the ornament or embroidery. They also describe the complicated apparatus employed to effect the result, which, among other devices, consists of a series of needles and shuttles, arranged in sets, each set having a needle and a shuttle, and the series being sufficiently multiplied to extend the work over the entire width of the material to be ornamented or embroidered. None but thin fabrics are used as the material for the foundation of the work, and the material is placed on two rollers, so arranged that the material may be wound off from one on to the other, in order, at proper intervals, to bring forward fresh surfaces to be ornamented; and being drawn over bars, between the rollers, which are at considerable distance apart, it is kept stretched, as it passes from one roller to the other, in the operation of the machine. All of the needles have a curve or crook in the length, and are attached to a bar, and that same bar operates the whole series. Drawings also are annexed to the specification, which shows what the construction of the shuttle is, but it is only necessary upon that subject to say that it is the common ribbon shuttle, as contended by the complainant. Gimp or cord, it will be remembered, is used in the shuttle instead of thread, and the description of the operation is that the shuttle passes through at the bend of the needle, and between the thread of the needle and the needle itself, every time the needle passes up through the material to be ornamented.

Broad loops of the thread carried by the needle are necessary, in order to secure the passage of the shuttle between the thread of the needle and the needle itself, as described in the specification, and on that account the needle is required to be formed with a curve or crook in its length, and it is obvious that a compliance with the requirement is essential to the operation of the machine, because without the additional space between the needle and its thread, which is obtained at the bend by the curve or crook in the same, the shuttle would not at all times

pass between the needle and its thread, and consequently would fail to perform its functions in a manner to accomplish the result described in the specification.

Minute description is also given of the several devices employed for driving the shuttle, but it is not necessary to enter into the particulars of the narration, as the apparatus described bears little or no analogy to the devices employed for that purpose in the machine of the complainant. Suffice it to say, that the shuttles are moved to and from the back and front of the machine, for the purpose of carrying the gimp or cord, and of performing certain other functions in connection with the operation of the needle in sewing down the gimp or cord. Explanations have already been given to show that the needle in its first movement comes up through the material to be ornamented, and that the shuttle passes between the needle and its thread as often as the needle ascends. Notice should also be taken of the fact, that the needle with its thread is employed to sew down the gimp or cord, carried by the shuttle on to the foundation material, and of the further description of the operation by which it is accomplished. Having described the operation of the devices which causes the first ascent of the needle, the inventors state, that just after the shuttle has been moved from the front to the back of the machine, the needle descends, "sewing down" the gimp or cord "laid by the shuttle"; and continuing the description, they also state that the needle then ascends again, when the shuttle is moved towards the front of the machine, until it is taken by the front catches and carried back, and then the needle again descends, which completes the operation. Laying the gimp or cord, therefore, is the principal result accomplished by the shuttle, but the sewing down of the same is accomplished by the needle. Compare the analysis given of the specification of the machine under consideration, with that given of the specification of the complainant's machine, and it is clear that the two are different in every material respect. One employs needles with a curve or crook in the length, and a common ribbon shuttle, while the other employs straight needles and a shuttle of peculiar construction, and those differences are

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characteristic and essential to the respective combinations in which they exist, and cannot be obliterated, in the one or the other, without affecting injuriously the operation of the particular machine. Stationary holding-surfaces are employed by the complainant, but there are no such devices in the other machine, and the apparatus for feeding the material and tightening the stitches, found in the machine of the complainant, are totally different from any corresponding mechanism described in the specification of the other machine. Marked, however, as the differences are, in respect to the devices employed, they are even more palpable and striking in respect to the mode of operation, as sufficiently appears from the explanations already given, which need not be repeated. Complainant's machine is suited to rapid sewing, and may be used to sew firm seams in garments, but the other machine cannot accomplish any such result, and cannot be made to do so without essential modifications, because, in point of fact, it is an embroidering-machine, and not a sewing-machine. Such a machine cannot supersede the machine of the complainant; and having come to that conclusion, it is not necessary to determine the question whether, in a case like the present, the foreign patent must be considered as taking date from the sealing of the letters-patent, or from the time of the enrolment of the specification.

Great reliance also is placed by the respondent upon the Thimonier machine, which was patented in the kingdom of France. Reference to the general elements of the combination, however, will be sufficient to show that the machine bears no substantial resemblance whatever to the machine of the complainant. First, it has no feeding apparatus of any kind, and consequently will not make a single stitch unless aided by the operator of the machine. Secondly, it has no shuttle or equivalent device, and employs but one thread in the stitching. Thirdly, it uses a crochet or hooked needle, instead of the needle employed in the complainant's machine, and a device termed in the patent an "accroucheur," which operates to lay the thread on to the hook of the needle after it has passed through the cloth. Fourthly, the material to be worked is laid upon

horizontal table, and so fed forward and guided by the hand of the operator. Fifthly, it has no mechanism by which the length of the stitch is regulated automatically, and the evenness of the stitching depends chiefly upon the skill and experience of the person who guides the material. Sixthly, there is no apparatus for the interlocking of two threads, and if there was, it would be useless, because one thread only is used in forming the seam. Seventhly, the stitch itself is widely different from that produced by the machine of the complainant. Experts describe it as the chain stitch, and the machine is denominated as one "suitable for the production of seams called chain-stitching upon all sorts of stuffs and cloths." Considering that the dissimilarity in this respect is admitted, it will be sufficient to add, without entering into particulars, that the stitch consists of a succession of loops, one through another, by a single thread, forming a continuous seam on the surface of the material employed as the foundation of the work. Eighthly, the holding apparatus is also substantially different in its mode of operation, and in its combination with the other devices, especially with those constituting the mechanism for feeding. They are the horizontal table on which the cloth is laid, and a device, called in the patent an "onglette," which is a small, thin tube or rim surrounding the crochet-hook, and which at times presses upon the cloth and holds it down upon the table, operating to prevent the cloth from following the hook in its retraction. Such pressure, however, only occurs when the crochet-hook descends for a loop, and of course the effect is upon the previously made loop, as well as upon the cloth, keeping it open so that the hook may pass through it without catching as it is retracted to bring up the new loop. While the pressure continues, the "onglette" obviously performs the function of a holding-surface, and it is also an efficient adjunct of the stitching mechanism; but when the new loop has been brought up, and the cloth is to be moved forward, the device in question, instead of co-operating to feed the cloth, as is the case in the machine of the complainant, is withdrawn altogether from the cloth, and becomes entirely inoperative. For these reasons, I am of the opinion that the machine has no ten-

dency to show that the complainant is not the original and first inventor of his improvement.

Nothing need be remarked respecting the W. Hunt machine, or the machine described in Brewster's *Encyclopædia*, except to say that the former was a failure, and the latter was a tambour-machine, for ornamenting goods in the web, and was designed to work with a series of crochet-needles extending across the entire width. Suggestions, however, are therein made that a needle with an eye near the point may be used, in combination with the hook, instead of the crochet-needle, as described. Proper devices to work with it in combination, in order to enable it to accomplish the result, are not described; and there is no suggestion that it should be grooved for the protection of the thread. Giving the suggestion the utmost force to which it can be entitled, in any point of view, it merely shows that an eye-pointed needle was known before the complainant invented his organized sewing machine. Suppose that be granted, still, the concession would not maintain the present defence, because the suggestion is of an untried invention, and is wholly unaccompanied by any explanations to show that it could be constructed and adapted for ordinary rapid machine sewing, or for sewing firm seams, as in garments.

Special reference was also made at the argument, to the machine of Henry Bock, and also to the machine of William Sneath, but upon examination, it appears that neither of those machines is set up in the answer, and consequently they are not in the case. Copies of the patents, however, were furnished to the court at the hearing, and in order to prevent any misapprehension upon the subject, it may perhaps be well to say that they have been examined, and I am of the opinion that if they had been duly set up in defence, they could not have benefited the respondent. But the objection to their introduction as evidence was seasonably taken, and clearly they cannot be admitted, as it would operate as a surprise upon the complainant.

Abandonment is also set up by the respondent, which is the next ground of defence to be considered. Among other things, he alleges that machines producing the chain-stitch, and

two-needle machines have been, with the knowledge of the complainant, extensively manufactured, used, and sold in public, and that he has deliberately acquiesced in such manufacture, use, and sale, whereby he has surrendered and abandoned any right or title he may have had to any exclusive property under his patent. He also alleges, that in consequence of such manufacture, sale, and use, and of the acquiescence of the complainant, he, the respondent, was led to believe, and did believe, that the manufacture of his machines would not be deemed to be an infringement of the complainant's patent, and was thereby induced to make large expenditures for carrying on his business as a maker of sewing machines, which will be wholly lost if he is enjoined in this suit. Argument is unnecessary to show that the matters pleaded in the answer are in avoidance of the claim of the complainant, as set forth in the bill of complaint. Such an allegation of the answer is not evidence, but the facts therein stated must be proved, and the burden of proof is upon the respondent. *Hart v. Ten Eycke et al.*, 2 Johns. Ch. 88; 2 Story's Eq. Juris. § 1529; 3 Greenl. Ev. § 287. Testimony was introduced by the respondent, which shows that needles for machine sewing, with grooves, had been known for about five years, and one of the witnesses stated that he had known them to be used in a very large number of chain-stitch and shuttle machines. Inquiry was also made of a third witness, who stated that he had frequently seen such machines, but he was not able to state what number he had seen, nor could he state how extensively they had been in use, or on sale. They do not state where they saw such machines, nor any of the attending circumstances, nor when or where they were manufactured, used, or sold. Knowledge on the part of the complainant, of such use and sale, is alleged in the answer, but there is not one of the witnesses that undertakes to testify to any such fact, or to state any circumstances from which any such presumption can properly arise. Acquiescence, therefore, on the part of the complainant in such manufacture, use, and sale is not proved, nor is it shown that the respondent had any reasonable ground to believe that the manufacture, use, and sale of machines like those of the complainant would not

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be deemed to be an infringement of the complainant's patent. Claim was not made for the grooved needle, in the original patent, and of course the complainant, under that patent, could not maintain a suit against any person for using such a device, although it was a part of his invention, and was fully described in his specification. Suits for an infringement, whether at law or in equity, must be founded upon letters-patent, and the plaintiff or complainant, as the case may be, can only recover for the invasion of what he has claimed in his patent, however much less the claim may be than his actual invention. Where the claim is narrower than the invention, and the description is given in the specification, the patent may be surrendered, and a reissue taken out, correcting the error, and that is what the complainant did in this case, and then, and not before, he was in a condition to enforce his right to that part of the invention. Judge Grier held, in *Goodyear v. Day*, Law's Dig. 363, that it is no justification of the infringement of a renewed patent that the infringer had used the invention with impunity, before the patent was amended; and the Supreme Court also held in *Stimpson v. W. C. Railroad Co.*, 4 How. 202, that no prior use of a defective patent can authorize the use of the invention after the defect is corrected, and the patent has been duly reissued. Complainant's patent, therefore, must be considered as valid, and I am of the opinion that he is the original and first inventor of the organized sewing machine described in his specification, when viewed as an existing whole. He also alleges that the respondent has infringed his patent, and the testimony shows that the respondent did make and sell a machine introduced in the case as the machine of the respondent, and the answer admits that he has made and sold one hundred and seventy-five of similar construction and mode of operation, so that the only remaining question is, whether the machine produced embraces the improvement of the complainant, or any substantial or material part thereof, as alleged in the bill of complaint. Whether it does so or not can only be determined by a comparison of the two machines. Examination of the machine of the complainant has already been made, and it now becomes necessary to examine

that of the respondent. His machine also carries two threads, and the stitch is formed by interlocking the same, substantially, in principle, as in the machine of the complainant, differing only in the fact that the under thread, carried by the shuttle or equivalent devices, is interlocked in a loop or bight, instead of a single thread, as in the machine of the complainant, making the difference between the stitches of the respective machines, as explained by one of the experts, about the same as that between a bow-knot and a hard knot. Each machine has a grooved eye-pointed needle, which is employed to carry the thread for one side of the cloth, and which perforates the cloth as a step in the making of the stitch, and for the purpose of forming a loop of the thread which it carries. Loops are formed of the thread carried by the perforating needle, in the same manner, and the functions performed by the needle, and the needle itself, are the same in both machines. Substantial similarity, therefore, is certainly shown in all the particulars mentioned, but the respective machines employ two threads, and it becomes necessary to attend pretty carefully to the description given of the manipulation of the second thread, and of the several devices employed to accomplish the work. As already explained, the complainant's machine carries the thread for the other side of the cloth, by means of a side-pointed shuttle, so constructed and arranged that it will catch the loop formed of the thread carried by the perforating needle, and open and spread it as it passes through the loop. On the other hand, the machine of the respondent carries the second thread, or the thread for the other side of the cloth, by the means of a thread-carrier, in form resembling a needle, and called by one of the experts a thread-controller, which is also employed for looping its own thread through the loop previously formed of the thread carried by the perforating needle, instead of carrying the end of the shuttle thread through the loop formed of the needle thread, as is done in the machine of the complainant. Attention to these explanations will show very clearly what is meant by the experts, when they describe the difference between the stitches of the respective machines as about the same as that between the bow knot and the hard knot.

Every loop made of the thread carried by the perforating needle, must be opened after it is formed, in order that the second thread in the complainant's machine, or a loop of the second thread in the respondent's machine, may be passed through it, so that the two threads may be interlocked, as required, to form the seam. Such opening of the loop, formed of the thread carried by the perforating needle, is accomplished in the machine of the complainant entirely by the shuttle, which also carries the second thread. Shuttles are not used in the machine of the respondent, either to carry the second thread or to open the loop formed of the thread carried by the perforating needle. Other devices, however, are found in his machine which perform the same functions, and which stand in the same combination as that in which the shuttle is arranged in the complainant's machine; and the question is, whether or not those devices are to be regarded as equivalents of the shuttle. Instead of the shuttle, the respondent employs the second needle or thread-carrier, already described, which evidently performs the same functions in carrying the second thread, and also in looping it through the loop previously formed of the thread carried by the perforating needle, because the interlocking of the thread is the characteristic principle of the manipulation in the formation of the stitch; and clearly it cannot benefit the respondent to show that he first loops the second or shuttle thread, and then uses it double or in loop, instead of single, as in the machine of complainant.

His second needle or thread-carrier, also commences to open the loop formed of the threads carried by the perforating needle, and continues to perform the function until an auxiliary device, called a hook, catches the partly opened loop and completes the operation, opening and spreading it precisely in the same manner, and quite as effectually, as the function is performed by the shuttle in the machine of the complainant. Different devices, or devices differing in form, and having different names, are certainly employed by the respondent for that purpose; but the plan or idea, the arrangement, combination, and result, are the same; and it is clear to a demonstration that every one of the functions performed by the shuttle in the machine of the complainant is

accomplished in the machine of the respondent by the lower needle, called the thread-carrier or controller, with the aid of its auxiliary device, the hook ; and I am of the opinion that the two combined are the equivalent of the shuttle, though it may be that they perform the work better. Holding-surfaces, stationary in their character, are also found in the machine of the respondent. They are the table or platform on which the cloth is laid, and the divided presser-foot, and they hold the cloth as well for resisting the thrust and retraction of the needle, as for the operation of tightening the stitch, and also to keep the cloth in place while it is moved forward, so that it may be fed in a determined plane. Speaking of the holding-surfaces, it will be convenient to distinguish them as upper and lower, as was done at the argument. The upper holding-surface, in the machine of the respondent, is the presser-foot. Undoubtedly it differs in form from the metallic plate, which is the corresponding device in the complainant's machine, because it is in two parts ; but those parts operate alternately, so that one of them is always upon the cloth, pressing it down upon the table, or in other words, when one part is raised to assist in feeding the cloth forward, the other is kept down to retain the cloth in the proper plane ; thus securing constant action, as in the machine of the complainant. Explanations are hardly necessary to show that the table, and the side of the shuttle-box, when employed as holding-surfaces, are equivalent devices, as it is quite obvious that the difference is a mere formal one, resulting from the substitution of a horizontal for a vertical position of the material to be sewed. Both the machines have the means of adjusting the upper holding-surface to the thickness of the material. Springs are employed in the machine of the respondent, and hence it is said to be self-adjusting ; but the adjustment is accomplished in the complainant's machine by a screw, and consequently the hand of the operator is required to accomplish the result. Looking at the respective devices under consideration as holding-surfaces, and testing the question by the function or duty performed by each apparatus, and the mode of the operation, I am of the opinion that the apparatus employed by the respondent is substantially the same as that

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used in the machine of the complainant. Sufficient description has already been given of the feeding apparatus employed in the complainant's machine. Respondent, in his machine, uses a reciprocating notched bar, and a presser-foot, and the feeding is accomplished by advancing the notched bar while the cloth is pressed down upon it; and then when the presser-foot is raised by withdrawing it in the same place. Palpable differences are observable in the form of the devices employed in one of the machines as compared with the other, but they perform the same functions, have substantially the same mode of operation, and accomplish the same result; and I am of the opinion that the devices, when considered together, and viewed as a feeding apparatus, are substantially the same as the feeding apparatus in the machine of the complainant.

Complainant is entitled to a decree for an account, and when the amount to be recovered is ascertained, a perpetual injunction will be granted.

RHODE ISLAND DISTRICT.

. N O V E M B E R T E R M , 1 8 6 4 .

JAMES C. HIDDEN, Executor and Trustee, v. THE SLATER MUTUAL FIRE INSURANCE COMPANY.

Policies of insurance against loss by fire are contracts of indemnity; and if the insured parts with his interest in the property before the loss, it invalidates the contract and releases the insurer.

Buildings held under a lease may be insured against loss by fire, but the policy, in such a case, becomes invalid, if the lessee, by mortgage and foreclosure, or otherwise, parts with his interest in the leasehold estate before the loss occurs.

The covenant in a lease of real property, to pay an amount in addition to a specified rent, equal to taxes and the cost of insurance for a certain sum, confers no authority upon the lessee to insure the buildings on the leased premises for the benefit of the lessor.

Such a covenant still leaves it optional with the lessor to insure or not as he may choose.

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and when and where he pleases; but if he neglects to insure, the lessee has nothing to pay on that account.

Viewed in any light, the case shows that the insured had parted with his interest before the loss, and therefore the plaintiff cannot maintain this action, as he cannot have any greater right than the insured.

ACTION of assumpsit on a policy of insurance. The case was submitted upon an agreed statement of facts. Suit was brought by the plaintiff as executor and trustee under the will of William Hidden, deceased, to recover the amount of a certain policy of insurance which was issued by the corporation defendants to one Hervey M. Richards on the 30th of December, 1858, to continue for the term of one year, but it was agreed that the policy was renewed from time to time, and was in full force at the time of the fire. The plaintiff, as trustee and executor as aforesaid, on the 31st of December, 1858, leased to Hervey M. Richards, for the term of ten years, a certain parcel of land known as the Union House estate, containing about one and three quarters acres, with a dwelling-house and other buildings and improvements thereon, and reserving an annual rent of \$400; the lessee paying in addition thereto "an amount of money equal to the aggregate sum of all national, State, town, district, road, school, or other taxes which may have been imposed upon said estate or upon its owners on account of ownership thereof, during the year preceding"; and also "an amount of money equal to the expense which may have been incurred in keeping said house insured against fire in the sum of \$3,350, for the benefit of the lessor, subject to the provisions of the lease as hereinafter set forth."

Payment of "the rent, taxes, and insurance" was to be made to the lessor at his residence at Attleboro', and in case of the destruction of the buildings by fire, the lessee, at his option, might surrender the lease, or might require the lessor to expend the proceeds arising from the policy of insurance, in erecting new buildings, or in case of partial loss, in the repairing of those injured.

On the 27th of August, 1857, the lessee executed a mortgage of his leasehold interest to H. N. Dugget. The lessee's application for insurance was dated on the 16th of July, 1858, and the

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case showed that it was for a policy in the sum of \$3,350. This was done without any notice to the defendants, of the prior mortgage. Pursuant to this application a policy was issued on the 30th of December, 1858, to Hervey M. Richards, on his interest as lessee, in the sum of \$3,000 on the frame hotel buildings known as the Union House, and on the addition to the same, and \$350 on the stable buildings attached to the addition.

The memorandum in the policy of insurance was, "payable, in case of loss, to James C. Hidden, executor of the estate of the late William Hidden, and the lessor." The renewal certificate was duly issued on the 31st of December, 1859, but no notice was then given to the defendants of any change in the condition of the property. On the 17th of January, 1860, the renewal certificate was returned in a letter from the insured to the defendants, and they were informed that he had, some twelve months before, assigned his lease to H. N. Dugget. He also requested them, if the assignment would operate to invalidate the policy, to make out a new policy in Dugget's name. Instead of complying with the request, the defendants, on the 18th of January in the same year, through their secretary, returned the certificate, suggesting, however, that the better way would be that the insured should assign the policy to the lessee, and forward the same to the office of the company to be attested. No attention was paid to the suggestion, and nothing further was done upon the subject.

The fire occurred on the 18th of May, 1860, and on the following day the insured sent a letter signed by H. N. Dugget, to the defendants, informing them that on the night previous the Union House property had been destroyed by fire, and was a total loss. On the 23d of May in the same year, the plaintiff presented the proof of loss to the defendants, but they objected to it, and subsequently a further statement was filed by the insured. About ten months before the fire, the insured went into insolvency under the laws of Massachusetts, where the insured property was situated, and Simeon Bowen and H. N. Dugget were appointed the assignees of his estate. The case further showed that H. N. Dugget, the mortgagee of the leasehold estate of the insured,

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ten months before the fire, in conformity with chapter 151, §§ 6, 7, and 8, of the Revised Statutes of Massachusetts, gave the notice therein required, of his intention to foreclose the mortgage for breach of the condition thereof. Accordingly the mortgagee took possession of the leasehold interest in the property, and thereafter the insured acted as his agent to collect rents, and that relation between them existed at the time of the fire.

A. Payne, F. F. Colwell, J. P. Knowles, counsel for complainant.

B. F. Thurston, J. M. Ripley, counsel for respondents.

CLIFFORD, J. The insurance was in the name of Hervey M. Richards, lessee, and the terms of the policy show beyond controversy that it was an insurance upon his leasehold estate. The terms of the lease neither required nor authorized him to effect insurance in the name, or even for the benefit of his lessor. The covenant was to pay an amount of money equal to the expense which may have been incurred in keeping said house insured against fire, in the sum therein specified, during the year preceding, but if no amount was expended by his lessor for that purpose, within the preceding year, then he had nothing to pay on that account. The lessor reserved the right to effect the insurance, and of course had the right to select the company and make the contract. The lessee might insure his own leasehold interest, but he could not insure anything more, unless he had made improvements. Undoubtedly he had made improvements, but the case shows that those improvements were insured in another office, so that he had no interest that was the subject of insurance, except that which he derived under his lease, and having parted with that before the loss occurred, he cannot maintain his action. Authorities are not necessary at this day to show that a policy of insurance is a contract of indemnity, and that if the insured parts with his interest in the property before the loss, and no new contract is made, it avoids the policy. *Hoxie v. Providence Mut. Ins. Co.*, 6 R. I. 517; *Lynde v. Dalget*, 3 Brown, P. C. 497; *Saddlers' Co. v. Braddock*, 2 Ashm. 254; *Angel, F. & L. Ins.* § 55; *Wilson v. Hill*, 3 Met. 66; *Carpenter v. Providence Mut. Ins. Co.*, 16 Pet. 495.

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Had the lessee covenanted to keep the premises insured during the term, and if the policy had been executed upon that subject-matter, it may be that the rule would be otherwise, but it is unnecessary to express any decided opinion upon that point, as no such question is presented by the facts in the case. According to the agreement of the parties, the verdict must be set aside, and judgment must be entered for the defendants.

MAINE DISTRICT.

APRIL TERM, 1864.

THE UNITED STATES v. MOSES MACDONALD, LEVI MORRELL,
SAMUEL JORDAN, AND HARRISON J. LIBBY.

Provision for commissions and allowances to collectors of customs was first made by the act of the 31st of July, 1789.

New regulations were instituted by the acts of the 18th of February, 1793, 2d of March, 1799, and by the Compensation Act.

A maximum rate of compensation was first prescribed by the act of the 30th of April, 1802.

By the act of the 7th of May, 1822, collection districts were divided into two classes, viz. : the enumerated and non-enumerated ports.

The emoluments of collectors of the non-enumerated ports might reach the sum of four thousand dollars; but the collector, after deducting the necessary expenses incident to his office, was required to pay any excess over that sum into the treasury of the United States.

The maximum rate of compensation allowed to collectors of the non-enumerated ports was three thousand dollars, and a similar provision relating to any excess over that sum was made, as in the first-named class.

By the act of the 3d of March, 1841, collectors were required to include in their quarterly accounts all sums received by them for storage of goods in the public storehouses for which a rent was paid beyond the rents paid by the collectors.

In *United States v. Walker*, 22 How. 313, the conclusion of the court is, that the compensation of a collector of one of the enumerated ports may be six thousand dollars, and of the other class five thousand.

Collectors are charged with the custody and control of all merchandise warehoused under the laws of the United States, and it is their duty to demand and receive of the importer the appropriate expenses of such custody and control.

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The sums thus demanded and received by collectors are storage within the meaning of the act of the 3d of March, 1841, whether the goods were deposited in stores leased by the United States, or other storehouses.

Whether deposited in public or other storehouses, the goods were to be kept under the joint locks of the inspector and importer, and such storehouse then became a public storehouse for the purpose of securing goods under the warehouse system.

Under the act of March 3, 1841, as well as by all the subsequent acts of Congress upon the same subject, private bonded warehouses are public storehouses, and collectors are authorized to retain, as part of their emoluments, sums received for the deposit of importations in such bonded warehouses, under the same provisions applicable to public storehouses.

When deposit of merchandise was made in public or private stores, appropriate expenses were to be paid by the party making the deposit; and the whole proceedings show that the goods in both cases alike were regarded as warehoused in the public stores of the United States.

THIS was an action of debt, and the case came before the court upon the demurrer of the plaintiffs to the rejoinder of the defendants. The declaration was drawn upon the bond of the first-named defendant as collector of the customs for the district of Portland and Falmouth in the State of Maine, and the other defendants were his sureties. He was appointed collector prior to the 20th of January, 1858, and between that day and the 18th of April, 1861, received for storage of merchandise in bonded warehouses the sum of \$6,281, as appeared by his quarter-yearly account, regularly rendered to the department. The pleadings showed that the moneys so received accrued, were accounted for quarter-yearly, and were retained by the collector, by virtue of his office, for storage of merchandise in bonded warehouses. The rejoinder also alleged that the moneys so received and retained by the collector in any one year did not exceed the sum of two thousand dollars, and the demurrer admitted the allegation. The receipt of the money was admitted by the defendants, but they claimed that the collector lawfully retained it under the act of the 3d of March, 1841, as part of his annual compensation. The plaintiffs denied his right to retain the amount, or any part of it, insisting that collectors cannot lawfully retain as compensation any portion of the moneys accruing from the storage of merchandise deposited in private bonded warehouses.

G. F. Talbot, United States District Attorney.

The provisions of the fifth section of the act of March 3, 1841, do not apply to the storage of goods in private bonded warehouses. There were in fact no bonded warehouses established or known to the law at the time this act went into operation. See 3 Stat. at Large, 469 ; 4 Stat. at Large, 591.

Two classes of stores were known to the law at the time of the passage of the act of March 3, 1841, namely, public stores and other than public stores.

By the act of March 3, 1841, the source from which the surplus storage is received, and which the collector is allowed to retain, is confined to the public warehouses. 5 Stat. at Large, 422.

There is no judicial construction by which the strict terms of this statute have been enlarged.

The act of August 6, 1846, limited the power of collectors to levy the proper duties upon warehoused goods and the expenses incurred. 9 Stat. at Large, 53.

The instructions of the Secretary of the Treasury could not enlarge this power.

The instructions to carry into effect this act defines the second class of warehouses to be stores in the possession of an importer, in his sole occupancy, which he may desire to place under the customs lock in addition to his own lock. Of the expenses of this kind of warehousing, storage is not reckoned as an item, because for the privilege of storing dutiable merchandise himself, the importer was required to pay monthly to the collector of the port, a sum equivalent to the pay of the officer necessarily in attendance, or one half the amount which would accrue as storage on the goods so stored, at the regular rates charged at stores, class No. 1.

It is not necessary to consider whether the act of 1846 authorized the collector to exact from the importer anything for storing his own goods, since the sum exacted does not exceed the pay of the officer required to be in constant charge of the goods.

Storage is not to be incurred, of course, when the importer undertakes to do his own storing.

The purpose of the regulations of 1849 was to "separate the

government as much as possible from the business of storage"; and it would be strange if these same regulations should prescribe a system of collecting storage when the law of 1846 only authorized the collection of "expenses."

The same arguments apply to Class 3, i. e. "stores in the occupancy of persons desirous to engage in the business of storing dutiable merchandise under the Warehousing Act." The same election is given whether to pay the officer in charge or the amount of half-storage at the public stores. See §§ 28 and 34, act of 1846; 9 Stat. at Large, 53.

From the acts of Congress prior to March 28, 1854, and the treasury regulations thereon, it is thus plain that storage as such, in bonded or private stores, could not be considered as the consideration of a legal exaction of imposts from the owner of warehoused goods.

None of the provisions of the first or third sections of the act of March 28, 1854, warrant the levying of storage in private bonded warehouses. Nothing is named as chargeable in either class of warehouse, but expenses.

When the private warehouses come to be named, storage is not mentioned as an element of expense; it is only provided that the "labor" must be performed by the owner, "at the expense of the owner." By the second section storage is named with labor and other charges on unclaimed goods. In the fourth section storage is mentioned as due in the public stores, labor as performed in the private stores. The treasury regulations of July 5, 1855, and February 1, 1857, under this act, speak of storage as an incident of expense only in the public stores. See § 542, Treas. Reg. February 1, 1857.

Since the government carefully framed statutes to separate itself from storage in bonded warehouses, nothing accrued to the government for such storage, and there was no fund from which the collector could retain any sum. The whole argument of defendants is based upon the collector's claim to a share of the "government storage," under the fifth section of the act of 1841.

The defendants' replication then is in law wholly insufficient, first, because they do not therein say that the storage, which the

said Macdonald retained by virtue of his said office of collector, was storage of goods, wares, and merchandise stored in the public warehouses, the storage of goods in the bonded warehouses, which were in fact and in law private stores, not being an expense to the United States, from the sum paid to reimburse which, the said collector might retain any part; nothing being in fact claimed by, due, or paid to the United States for said storage under the law.

Second. Because they do not therein say, that said storage accrued for goods, &c., stored in the public warehouses for which a rent is paid.

Third. Because they do not therein say, that said sum, &c., as aforesaid retained, was retained from an excess of rent and storage received by the United States for storage of goods, &c., in the public warehouses, for which a rent is paid beyond the rent paid by the said collector.

Fourth. Because they do not therein say, that said sum of \$6,281 so retained by the said Macdonald, by virtue of his said office, was retained in instalments of not more than \$2,000 for any one year.

Every one of these clauses and limitations in the act of March 3, 1841, are vital and essential. To sustain his claim under the act, the late collector of Portland must bring himself within each of them. To argue that public warehouse means private warehouse, is as hopeless a task as to argue that in a statute public way means private way, or public lands means lands of individual proprietors, or public buildings the houses of citizens. To argue thus, is to disregard the sound maxim that, where one class of several distinct classes is named in a statute or contract, the term becomes one of express exclusion as to other classes of the same general thing or subject. The classification of warehouses as public and private warehouses is not the new suggestion of a distinction for the purposes of the argument, but is a distinction that has been kept up in all the legislation of Congress, in all the instructions of the Treasury Department, and in all the practice of the revenue service from the first establishment of warehousing.

It is equally requisite that storage to be claimed by the collector as emoluments of office must have accrued from rented stores, stores for which a rent is paid by the collector, and also that it must have accrued from an excess of storage received above rent paid, and that in no one year it has exceeded the sum of \$2,000.

If collectors at each of the ports are permitted to take as emoluments the storage of dutiable goods in private bonded warehouses, where such storage does not exceed \$2,000 per annum, then the government, contrary to what may be considered in the warehouse acts as a stipulation between itself and the importer, is exacting an extra duty on foreign merchandise simply to increase the emoluments of collectors.

The inequity of the collector's claim to retain this money becomes more apparent from these considerations. The service rendered in the case of dutiable goods warehoused in bonded stores is either storage, or the care of the custom's officer in charge. But the storage is not to be charged to the merchant, who, under the law permitting it, stores his own goods at his own expense. Only such care of the inspecting officer can be actually charged as expense incurred, although it may be called half-storage for the purpose of fixing its maximum rate. Now to whom ought this in equity to be paid? Not to the collector; for under the law he has rendered no service and incurred no responsibility whatever. For the entry, and various papers and records, required to be made to legalize the warehousing of goods in private stores, he has been remunerated by fees fixed by law. The custody of the goods is in another officer, whose functions are distinct from his. Not to the inspector himself; for he is the employee of the government, and is paid by his regular *per diem* wages at a rate fixed by law, and because he is prohibited by section 73, of act of March 2, 1799, from taking any extra fee for official service; but clearly to the United States, who, through the inspector employed and paid by them for such service, by the charge and care of the warehoused goods, maintain the security of their lien as the law permits.

The storage which collectors are properly allowed to receive is

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the excess of storage received for goods stored in the public warehouses above the rent paid by the collectors. In this case the collector appropriated the gross receipts of storage, and also a fund accruing from another source than storage in the public warehouses.

The plain provision of the act of March 3, 1841, under which the fund is claimed by defendant is, that in fixing the rates of storage on dutiable warehoused goods, in such of the public warehouses as are rented to the government, if an excess of storage accrues above rents paid, the government donates such excess, when not over \$2,000 per annum, to the collector.

Shepley and Dana, for defendants.

The opinion of the court in *United States v. Walker*, 22 How. 299, decided three questions.

First. Whether the tenth section of the act of the 7th of May, 1822, was repealed by any subsequent act; and if not then, .

Second. What is the true construction of the act of the 3d of March, 1841?

Third. Whether by the true construction of the two acts the defendant had a right to retain to his own use the moneys received from rent and storage, to an amount not exceeding \$2,000?

The court decided that every collector had the right to retain to his own use storage receipts to the amount and in the manner before indicated.

Upon the third question they decided that collectors of the non-enumerated ports may receive as an annual compensation \$3,000, and that they are entitled in addition, to whatever sums they may receive for rent and storage not exceeding \$2,000; but the excess beyond that sum they must pay into the treasury.

The pleadings admit that the money claimed by the government was received and retained as storage. Then the question is, do receipts for storage of merchandise in bonded warehouses come within the fifth section of the act of March 3, 1841. This act is the first and only one requiring an account from collectors of money received for storage. The aim of the fifth section was to require an account of the storage "heretofore retained by collectors for their own use."

To answer the design, the remedy must be regarded as broad as the mischief. It applies to all storage receipts; makes no exclusion. It covers as well the sums of money received for deposit of merchandise in the public stores, under the laws of April 20, 1818, and July 14, 1832, as the receipts (*in futuro*) from the newly rented stores under the sixth section of the act of 1841. Unless this construction is accepted, and this scope allowed to the provisions in relation to accounting for storage receipts, the mischief intended to be remedied will be but imperfectly met, as there would be entire failure of law, requiring an account, except for the newly rented stores, prescribed in 1841.

Not only the storage received from the stores owned by the United States would be unprovided for, but all sums due and accruing for rent and storage, for stores previously rented in the name of collectors, and still occupied as depositories, pursuant to the provisions of law.

Nothing in the language of the fifth section authorizes its limitation in this manner. It provides, in the words following, "that every collector shall render a quarter-yearly account under oath," &c., of all sums of money received "for rent and storage of goods," &c., "which may be stored in the public storehouses, and for which a rent is paid, beyond the rent paid by the collector."

The natural meaning of this language, and its only purpose, was to require an account "for the rent and storage of goods," &c., which may be stored in the public storehouses, &c., beyond the rents paid, &c., viz. an account for the profits of custom-house storage. It was not intended to, and it does not, define the place, or prescribe the mode, in which the privilege may be enjoyed. The reference made to the public storehouses, is designatory of the merchandise allowed to be stored, and should not be regarded as characteristic or distinctive of storage, or the sums of money for which an account is required to be rendered quarter-yearly.

If merchandise, and not storage, is designated, the mischief intended to be remedied is completely met, for the enactment relating to all goods allowed by law to be deposited in the pub-

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lic storehouses is both retrospective and prospective. Storage, whenever and wherever derived, comes within its meaning, and must be accounted for in obedience to its requirements.

“Where the interpretation of the revenue laws and regulations are involved, great weight is given to the practice of the government under them, as the contemporaneous construction of their intent and meaning.”

Relying upon this familiar principle for statutory construction, the practice of the department is most confidently appealed to in support of our last proposition.

Both in the enumerated and unenumerated ports, the sources from which storage is derived are the same. The collectors in each class of ports are under the same responsibility, and perform the same duties. Since the law of 1854, no stores have been leased by the government for the deposit of merchandise in course of importation, except for the use of the United States appraisers, at any port where a bonded warehouse existed. The public stores, previously rented for the purpose of storing warehoused or unclaimed goods, were expressly discontinued by the seventh section of the law of 1854. This section directs, “that all leases of stores now held by the United States for the purpose of storing warehoused or unclaimed goods, shall, on the shortest period of termination named in said lease, be cancelled, and that, after the 1st of July, 1855, no lease shall be entered into by the United States, at any port where there may exist a private bonded warehouse. While the government are thus prohibited from renting stores for the purpose of warehousing goods, the law of 1854 provides for custom-house storage by substituting bonded warehouses for the stores previously rented. These bonded warehouses are public stores, being subject, as to rates of storage, to regulation by the Secretary of the Treasury. The use of these newly constituted depositories for duty-paying importations, was the same as the public storehouses existing anterior to their establishment; and like them, they were appropriated exclusively to receiving foreign merchandise. Importations deposited in the bonded warehouse, were at the sole and exclusive risk of the owner or importer. The new system increased the care and

responsibility of collectors, occasioned by the storing of merchandise. The privilege granted to the importer was enlarged. All the rights of the government under previous laws were carefully preserved, and further guaranties provided. The possession of the merchandise was as complete under the new system as the old; in the bonded warehouse, as in the store owned or leased by the government.

Cargo taken possession of by the collector might be stored in any private bonded warehouse authorized by the act of 1854, "and all charges for storage" were required to be paid by the claimant in the same manner as though the merchandise had been stored in any public warehouse owned or leased by the United States. See *Clark v. Peaslee*, 1 Cliff. 545.

"The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive on which the legislature proceeded, from the end in view, or the purpose designed."

The aim of the law of 1841 was to require an account of money received as storage from the public storehouses; and as it has been already shown that "bonded warehouses," under the existing laws, are "public storehouses," under the rule laid down, this money must be taken to be within the meaning of that act, notwithstanding its precise words.

In accounting for storage receipts under the law of 1841, the court have decided that in no case was a collector obliged to pay into the treasury anything "but the excess beyond the \$2,000," that being the sum allowed as additional compensation. The storage receipts, under the subsequent statute of 1854, coming within the meaning of the former statute, this rule for accounting necessarily obtains. Under it, storage received from bonded warehouses, is allowed as an element of additional compensation for the collectors of the enumerated ports, and it should not be denied to the collectors of the non-enumerated.

Previous to 1841, there being no law requiring collectors to account for receipts for storage, they retained whatever sum was not required to pay the rent of the occupied stores, to their own use, and it went to swell the amount of their annual com-

pensation. "To correct that supposed abuse, the act of the 3d of March, 1841, was passed." Congress has passed no subsequent law on the subject; and unless the construction is sustained, that the storage received from bonded warehouses comes within the meaning of this act, the treasury will be in the same dilemma which occasioned its enactment. That is, there will be found no law, requiring collectors to account for receipts of storage from the occupants of private bonded warehouses.

The various suggestions submitted in support of the defendant's claim to retain the money to his own use, demanded by the government, are believed to successfully establish the following conclusive propositions:—

1. That the payments by occupants of bonded stores, under the warehouse laws, are storage.

2. That this storage comes within the meaning, and is recognized by the fifth section of the act of March 3, 1841, the true construction of which allows "every collector" an additional compensation out of the profits of custom-house storage.

3. That if these payments are not recognized in the act of 1841, there is no law requiring an account, and they may be retained by collectors.

4. That either view is equally fatal to the demand of the government, and judgment should be given in favor of defendant.

CLIFFORD, J. Unaided by former decisions, the question is one which would require an elaborate consideration, but it is not a new question, as will presently more fully appear. *United States v. Walker*, 22 How. 303.

Collectors receive a prescribed sum called salary, but their principal compensation is now, and always has been, derived from certain enumerated fees, commissions, and allowances authorized by acts of Congress. Provision for such fees, commissions, and allowances was first made by the act of the 31st of July, 1789, which also allowed to those officers certain proportions of fines, penalties, and forfeitures. 1 Stat. at Large, 64.

Those regulations were not satisfactory, and new ones were enacted in their place, as appears by the act of the 18th of February, 1793, and by the act entitled An act to regulate the col-

lection of duties on imports and tonnage, passed on the 2d of March, 1799, and by the Compensation Act, passed on the same day. 1 Stat. at Large, 316, 627, 786.

By those several acts collectors of the customs were required to keep accurate accounts of all fees and official emoluments by them received, and to transmit the accounts to the comptroller of the treasury ; but the collectors were allowed to retain to their own use, the whole amount of emolument derived from these sources, without any limitation. A maximum rate of compensation was first prescribed by the act of the 30th of April, 1802, as appears by the third section of that act. 2 Stat. at Large, 172.

Whenever the annual emoluments of any collector, after deducting the expenses incident to the office, amounted to more than \$5,000, the directions and requirements of the act were, that such collectors should account for the surplus, and pay the same into the treasury of the United States. Collection districts were, by the act of the 7th of May, 1822, divided into two classes, usually denominated the enumerated and the non-enumerated ports. 3 Stat. at Large, 693.

Emoluments of collectors for the enumerated ports, under the provisions of that act, might reach the sum of \$4,000 ; but the ninth section of that act provided, that whenever the emoluments should exceed that sum in any one year, the collector, after deducting the necessary expenses incident to his office, should pay the excess into the treasury for the use of the United States. The maximum rate of compensation allowed to collectors of the non-enumerated ports, under the provisions of that act, from all sources of emolument therein recognized and prescribed, is \$3,000 ; and the tenth section of the act contains a provision similar to that contained in the ninth section, requiring collectors of the non-enumerated ports to account for, and pay over, the excess beyond the amount allowed as the maximum rate of compensation. Under those provisions, collectors might receive the maximum rate of their offices, if the office produced that amount, after deducting the necessary expenses incident to the office, from all the sources of emolument recognized and prescribed by the then existing laws. No one could receive more

than the maximum rate, and his lawful claim might be much less, according to the amount of business transacted in the office. The compensation of collectors remained without any material change from that time until the act of the 3d of March, 1841, was passed, which is the act that gives rise to the principal question in this case. 5 Stat. at Large, 422.

Every collector is required by the fifth section of that act to include in his quarter-yearly account, among other things, all sums received by him for rent and storage of goods, wares, and merchandise stored in the public storehouses, for which a rent is paid beyond the rents paid by the collector.

The Supreme Court held in *United States v. Walker*, 22 How. 313, that, if from such accounting the aggregate sums received from that source exceeded \$2,000, the collector, by the true construction of the section, was directed and required to pay the excess into the treasury as part and parcel of the public money. But the same court held, that when the sums so received from that source did not in the aggregate exceed \$2,000, the collector might retain the whole amount to his own use, and that in no case was he obliged to pay into the treasury anything but the excess beyond the \$2,000. The conclusion of the court, therefore, was, and it was an unanimous conclusion, that the compensation of a collector of one of the enumerated ports may be \$6,000, and that the compensation of a collector of one of the other ports may be \$5,000, according to the state of the importations, and the amount received from rent and storage. The port of Portland is one of the non-enumerated ports. Consequently the collector here may receive as an annual compensation for his services the sum of \$3,000 from the sources of emolument recognized and prescribed by the act of the 7th of May, 1822, provided the office yields that amount from those sources, after deducting the necessary expenses incident to the office, and not otherwise; and in addition thereto, he is also entitled to whatever sum or sums he may receive for rent and storage, provided the amount does not exceed \$2,000, but the excess beyond that sum he is required by law to pay into the treasury as part and parcel of the public money. None of these principles are at-

tempted to be controverted by the plaintiffs, nor can they be with any success, as they are definitely settled by the unanimous opinion of the Supreme Court. The plaintiffs admit that such is the fact, but insist that no storage as such, within the meaning of the fifth section of the act of the 3d of March, 1841, ever accrued to the United States from dutiable merchandise warehoused in any other than the public stores mentioned in the sixth section of the act of the 14th of July, 1832, entitled, An act to alter and amend the several acts imposing duties on imports. 4 Stat. at Large, 591.

They do not controvert the fact that the collector is charged with the custody and control of all merchandise warehoused under the laws of the United States, nor that it is his duty to demand and receive of the importer the appropriate expenses of such custody and control; but the argument is, that none of the sums demanded and received for such expenses are properly denominated storage, unless the merchandise was warehoused and deposited in stores leased by the United States. According to their theory, a collector must account for all sums received for such expenses, in every case under the act of the 3d of March, 1841; but unless the same were received on account of merchandise deposited in a public store held under lease, he must in all cases pay the whole amount into the treasury of the United States. But the construction is one that cannot be sustained. First, because if the act of the 3d of March, 1841, applies at all to the case, that part of it that provides for the appropriation of the money so received, is as applicable to the case as that which requires the account. Secondly, because storehouses other than those owned or leased by the United States, were recognized in the acts of Congress prior to the act authorizing collectors to retain to their own use all sums received for storage, not exceeding \$2,000 in any one year. Wines and distilled spirits, under the act of the 20th of April, 1818, might be warehoused "in such public or other storehouses" as might be agreed upon between the importer and surveyor, or officer of inspection of the revenue for the port where the wines or spirits were landed. 8 Stat. at Large, 469.

Whether deposited in the public or other storehouses, the goods were to be kept under the joint locks of the inspector and importer, and no delivery of the same could be made unless the duties were first paid or secured, nor without a permit in writing, under the hand of the collector and naval officer of the port. Custody and control were the same, whether the merchandise was deposited in a public or other storehouse; and whether in the one or the other, the expenses of safe-keeping were to be paid by the importer or his agent. The importer and the proper revenue officer might agree upon a storehouse, as a place of deposit, other than one owned or then held under lease by the United States; but as soon as the merchandise was deposited in the storehouse, and the locks of the inspector were affixed to the doors, it became a public storehouse for the purpose of securing the goods under the warehouse system. Suppose it to be so, still it is contended by the United States that the provisions of the act of the 3d of March, 1841, do not apply to the bonded warehouses described in the rejoinder of the defendants, because they insist that the bonded warehouses therein mentioned were private bonded warehouses, and they contend that private bonded warehouses are not public storehouses within the meaning of that act, which in point of fact is the only question of any importance in the case. As before remarked, they concede that the act applies to public stores, and that collectors are in all cases required to account quarter-yearly, but insist that they are not authorized to retain any portion of the amount, because private bonded warehouses are not public storehouses. The instructions of the department require collectors to account quarter-yearly for all sums received as storage, whether the merchandise was warehoused in the stores held under lease, or in bonded warehouses or in any other storehouses authorized to be used for that purpose, as the depositories of imported dutiable merchandise; and unless the act of the 3d of March, 1841, authorizes that requirement, it is difficult to see on what law the instructions are based. But it is not necessary to place the decision upon that ground because I am of the opinion that private bonded warehouses are public storehouses within the meaning of that act, and of all the

subsequent acts of Congress upon the same subject. Entry for warehousing, under the act of the 6th of August, 1846, was required to be made in writing, in such form, and to be supported by such proof, as should be prescribed by the Secretary of the Treasury. Deposit of the merchandise might be made in the public stores, or in other stores, to be agreed on by the collector or chief revenue officer of the port, and the importer, owner, or consignee; but the requirement was that the collector should first take possession of the merchandise, and such other stores as were to be secured in the manner provided in the prior act, for the deposit in public warehouses of wines and distilled spirits, to which reference has already been made. Appropriate expenses were to be paid by the party making the deposit; and the whole proceedings show that the merchandise in the latter as well as in the former case is regarded as being warehoused in the public storehouses of the United States. 9 Stat. at Large, 53.

All of the sums in controversy in the case of *United States v. Walker*, 22 How. 299, had been received under that law, and yet the distinction set up in this case never occurred to the Supreme Court. On the contrary, the court in that case expressly held that the collectors of the non-enumerated ports might receive, in addition to the \$3,000 authorized by the act of the 7th of May, 1822, whatever sum or sums they might receive for rent and storage, provided the amount did not exceed \$2,000 in any one year; and directed the charges against the defendant in that case to be settled in accordance with those principles. Considered in that point of view, that case is decisive of the question under consideration. The demurrer, it should be remembered, admits whatever is well pleaded. The rejoinder not only alleges that the whole sum sued for accrued for storage between the 20th of January, 1858, and the 18th of April, 1861, inclusive, but that the sum accrued was accounted for quarter-yearly, and retained by the collector by virtue of his office, and that the sum accrued was so accounted for and retained, in sums not exceeding \$2,000 in any one year. Taking the admission as made, then it is clear that the only practical question is, whether the bonded ware-

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houses described in the rejoinder are public storehouses within the meaning of the provisions of the act of the 3d of March, 1841, under which the same accrued, and was received, accounted for quarter-yearly, and retained. Argument upon that question is unnecessary in this court, as the question was recently presented to the court in another district of the circuit, and after full consideration was directly decided in the affirmative. *Clark v. Peaslee*, Mass. Dist., Oct. Term, 1862.

A repetition of the reasons there given for the conclusion is unnecessary, as the opinion has been published, and is in the hands of the parties in this case. Half-storage had been demanded by the collector in that case, and the same had been paid by the merchant under protest. Having made the payment under protest, he brought suit to recover back the money, upon the ground that private bonded warehouses were not public storehouses within the meaning of the several acts of Congress authorizing the warehousing of dutiable merchandise. Able counsel were heard in support of the proposition, but upon full consideration, this court held otherwise, and gave judgment for the collector. Both parties, I believe, have acquiesced in that judgment as a correct exposition of the law of the case, and until reversed by the Supreme Court, I must adhere to that opinion. Demurrer overruled. Rejoinder adjudged good. Judgment for the defendants.

MASSACHUSETTS DISTRICT.

MAY TERM, 1864.

JOHN LIGHTNER v. J. W. BROOKS.

A railroad corporation made a contract with a manufacturer for the building of certain cars, to contain, among other things, a certain patented improvement of a third party. The contract was, in behalf of the corporation, signed by the chairman of the directors, as chairman. The contractor had no license to use the patented improvement. Suit by the patentee against the said chairman.

Held, the defendant's contract could not be construed as authorizing or contemplating any trespass upon the rights of the patentee, and that he was not liable.

Both the master who commands the doing, and the servant who commits the act of trespass, may be made responsible as principals, and may be sued jointly or severally.

But in this case, even if the contract be regarded as that of the defendant, it does not amount to a command, direction, or authority to the contractor to use the patentee's invention without license, neither is there any reason to infer that there was any such relation as that of master and servant, either between the contractor and the defendant or between the contractor and the railroad company.

Whether the rule would be different if the materials had been furnished by the company, and the contractor had been at work in their shop, *quære*.

Unless it be assumed that the defendant contracted that the builder of the cars should use the plaintiff's improvement without license, it cannot be admitted that the contract furnishes any ground to infer, that any violation of the rights of the plaintiff were intended by a stipulation for the delivery of the cars to the railroad company.

TRESPASS on the case for an alleged infringement of a patent. Facts agreed. The defendant was a stockholder in the Hannibal and Saint Joseph Railroad Company, which is a corporation created by the laws of the State of Missouri, and was also chairman of the board of directors of said company. The meetings of the directors were usually held in Boston, in this Commonwealth. In November, 1858, the corporation made an agreement with one Osgood Bradley to construct for them twenty-six passenger cars. Among other things, the contract provided that the trucks were to be furnished with safety-beams, double-connection brakes, swing-motion, and Lightner boxes. The agreed state-

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ment also showed that the contract was negotiated and executed in behalf of the corporation, by the defendant, as chairman of the board of directors, and that he transacted the business pursuant to a vote of the directors authorizing his predecessor in office to contract for such amount and kind of rolling stock as he might deem expedient. The contract was made in behalf of the company by J. W. Brooks, chairman. The cars were built by the contractor as agreed, and contained what are called Lightner boxes, which it was admitted were the same, or substantially the same, as those described in the plaintiff's patent. All the cars were completed within the time specified in the declaration, delivered to the railroad company pursuant to the terms of the contract, and up to the time of the commencement of the suit had been used by the corporation as part of their rolling stock.

It was agreed, if the court was of opinion that the defendant was not liable, then a verdict was to be rendered in his favor; otherwise, the agreed statement was to be discharged and the case to stand for trial.

Causten Browne, for plaintiff.

The facts show a valid patent. Infringement by the making of certain cars for, and their use upon, the Hannibal and Saint Joseph Railroad.

The cars made and put on the road by the direction of the defendant, acting upon his own judgment and responsibility.

These facts are understood by the plaintiff to bring the case directly within the terms of a late decision of the United States Circuit Court for the Second Circuit. *Goodyear v. Phelps*, November 28, 1853, Nelson, J.; *Popponhusen v. Falke*, 1862, Shipman, J.

It is claimed that defendant is liable, both for making and using the infringing cars. As to making, it was done by one Bradley, but to order, and his employer is liable as well as himself. *Boyce v. Dour*, 3 McLean, 583.

Brooks and Bradley might have been joined. *Brick v. Cobb*, 6 Law Rep. 547; *Dodge v. Bassett*, Sprague, J. 1861. And if so either may be sued separately. But the defendant was the employer, who, in the exercise of his own discretionary power,

procured these cars to be made. So with the use of the cars on the Hannibal and Saint Joseph Railroad. They were put upon the road by the direction of the defendant. They were continued in use by his direction or that of the board of directors; and if the board of directors would be liable as users, the defendant is liable as user, as one of that unincorporated body.

The defendant seeks to defend himself both as to the making and using, by showing that he has done so by authority of the company.

But the unlicensed manufacture and use are mere torts. Not nonfeasances or misfeasances for which a principal alone is answerable; but malfeasances which no agency can protect, and for which the agent is directly and personally answerable. Story on Agency, §§ 311, 312, and cases; *Perkins v. Smith*, 1 Wils. 328; *Stephens v. Elwell*, 4 Maule & S. 259. These cases are selected because the acts for which the agents are personally charged were simple torts without fraud, &c.

Cases bearing specially upon the defendant's case as a director of the company, are *Salmon v. Richardson*, 30 Conn. 360; 1 Litty on Plead. 81, 83; *Bell v. Josselyn*, 3 Gray, 311; 2 Greenl. Ev. § 68; *Commonwealth v. Ohio, &c. Railroad*, 1 Grant, 19; *Calhoun v. Richardson*, 30 Conn. 210.

The directors, by their agent, Brooks, put these cars in use upon the road; they had the right to put whatever cars they thought proper (for they gave Brooks that power) in use on the road. They had a right to substitute others, if they found those already there improperly there. It is a fair inference from the agreed facts that the directors knew the cars had gone upon the road and contained Lightner boxes. They then directed their continued use with Lightner boxes, and are users themselves. If so they are liable jointly and severally.

Sidney Bartlett, for defendant.

As a general principle an agent of a corporation, acting in its behalf, who authorizes the commission of a tort, for its benefit (whether such agent be president, director, superintendent, or stockholder) is personally responsible to the injured party. The fact that he has or has not an interest, or does or does not

derive a benefit from the act, has no influence upon the question of his liability. That liability results from his knowingly participating in an act which is a tort.

This contract is not an authority or direction to affix a patent article to the cars without license of the patentee. The legal and just implication is not, that it is intended to violate the patent of the plaintiff, but that the manufacturer charges in his price and will obtain, or has, the required license.

If it could have been shown that defendant, after the delivery of the cars to the corporation, learned and knew that Bradley had affixed Lightner boxes to the cars without license, and that they had since been used by the corporation, and that defendant had had authority to interfere and direct the general agent to cease using them, still defendant could not be charged with tort. Mere inaction, when one has power to interfere and prevent a trespass, does not make one a trespasser. His failure to interfere might make him liable to his employers for neglect of duty. In such case plaintiff's remedy is against the manufacturer or the corporation. Story on Agency, 370.

There is nothing to show that defendant ever knew that Bradley had, without license, affixed plaintiff's boxes to the cars, and he must consequently be deemed ignorant of any violation of plaintiff's patent.

Moreover, in the agreed statement of facts there is nothing to show that defendant had in himself any authority in any manner to interfere to prevent the use of the cars; and there is nothing in the case or in the law, to authorize any single director, though he be chairman of the board, and a stockholder, to govern the proceedings of the superintendent and general agent.

CLIFFORD, J. The argument for the plaintiff is that the defendant is liable, because it is insisted, that whenever an agent of a corporation assumes to authorize, or directs the commission of a trespass, the agent assuming to confer the authority, or who gives the directions, is himself personally liable to the injured party, although he did not directly participate in the commission of the wrongful act. Undoubtedly all persons commanding, procuring, aiding, or assisting in the commission of a trespass are

principals in the transaction, and stand responsible to answer in damages to the injured party: Both the master who commands the doing, and the servant who does the act of trespass, may be made responsible as principals, and may be sued jointly or severally for damages, as the injured party may elect. *Herring v. Hoppock*, 15 N. Y. 413; *Castle v. Bullard*, 23 How. 185; *Baker v. Lovett*, 6 Mass. 80; *Smith v. Rines et al.*, 2 Sumn. 348; *Murray v. Lovejoy*, 26 Law Rep. 428. But the question in this case is whether the agreed statement shows that the defendant ever commanded, procured, or in any manner authorized or directed the wrongful act which is the subject of complaint.

He denies that the terms of the contract, even if it be regarded as his contract, which it is not, amounts to any command, direction, or authority to make or use the improvement of the plaintiff without license, and consequently insists that none of the principles suggested, which he admits are correct, have any application whatever to the facts of the case. Referring to the agreed statement, it will be seen that all the defendant did, whether as agent or otherwise, was to make the contract for the twenty-six cars, which when completed, were to be delivered to the company for their use. The terms of the contract were that the cars, when completed and ready to be delivered, should contain the improvement in question, but he neither commanded, directed, or stipulated that the contractor should infringe the patent of the plaintiff, or that he should make or use his invention unlawfully or without license. Patentees have the exclusive right to make and use their inventions, and vend the same to others to be used, for the period of time specified in their patents. The exclusive right of vending the improvement to others to be used is as much a part of the monopoly, as the exclusive right to make and use the same, and in respect to improvements like that of the plaintiff, much the greater portion of the value of the monopoly secured by the patent consists in the right of sale, and transfer of that right, by license or assignment. The assignees and licensees accordingly become the lawful manufacturers of the patented improvement, and common experience shows that they are as frequently,

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if not much oftener, the lawful vendors of the improvement than the patentee. When the defendant in this case contracted that the cars should contain the improvement of the plaintiff, he did not command or authorize the contractor to infringe the patent of the plaintiff, and there is not a word in the contract to indicate that the defendant contemplated any such infringement, or that he had any reason to believe that any infringement of the rights of the plaintiff would ensue, as a legitimate consequence of the contract. The person contracting in this case was not the servant of the defendant, and the agreed statement furnishes no ground to infer that there was any such relation as that of master and servant, either between the contractor and the defendant, or even between the contractor and the railroad company. On the contrary, the clear inference from the whole case is, that the contractor was in the exercise of an independent business, working in his own shop, furnishing his own materials, and selecting, employing, and paying his own workmen, wholly independent of the company or of the defendant. Whether the rule might or might not be different if the materials had been furnished by the company, and the contractor had been at work in their shop, as their servant or mere employee, it is not necessary to determine, because there is not a fact or circumstance in the case to justify or support any such theory. The case shows that the contractor was a car-builder, and that the defendant, as the agent of the company for that purpose, contracted with him to construct twenty-six cars for the company, according to certain written specifications, which made a part of the contract. The specifications, as furnished, enumerated the improvement of the plaintiff, and the contractor agreed that the cars when completed and offered for delivery to the company, should contain that improvement. He built the cars containing that improvement, and within the time specified in the contract delivered the same to the company, and the same have ever since been in their use as part of their rolling stock. Taken as stated, it is clear that no reasonable construction of the contract can authorize the conclusion, either that the defendant committed a trespass, or commanded or directed one to be committed by the contractor

Where parties contract for implements, machines, or structures to contain any of the modern patented improvements, without any knowledge that the contractor is an infringer, or intends to use the improvement without authority, it is not the just and legal implication from the contract that the party ordering the article contemplates that the contractor will violate the rights of the patentee, or that he thereby commands or directs an infringement. Such contracts are now of daily occurrence, and unless there is some proof of concert, or something in the terms of the contract to indicate a contrary intent, the presumption must be that the person ordering the article either supposed that the contractor had the right to use the improvement, or, as part of the price to be paid by the purchaser of the article ordered, would procure the right of use from some person authorized to grant it for that purpose. The opposite theory cannot be supported without imputing fraud to the party ordering the article, which is never to be presumed without proof, and therefore, as there is no proof of the imputation, the theory cannot be sustained. Granting the rule of law to be so, still, it is insisted by the plaintiff that the defendant is nevertheless liable, because it appears that the cars so contracted for by him were to be delivered, and were delivered to the railroad company, and have ever since been in use by the corporation. The proposition of fact deduced from that statement is, that the cars were put upon the railroad by the direction of the defendant, and that they have ever since been continued in use by his direction. Were the facts so, it may be that the consequences supposed would follow, but the difficulty with the proposition is that the theory of fact assumed is not sustained by the agreed statement. The contractor delivered the cars to the railroad company, pursuant to the terms of the contract. The defendant gave no directions upon the subject, and the cars have ever since been continued in use by the company, because they hold the property in them under the purchase. Unless it be assumed that the defendant contracted that the builder of the cars should use the improvement of the plaintiff unlawfully and without license, it cannot be admitted that the contract furnishes any ground to presume that he con-

templated any such violation of the rights of the plaintiff, in stipulating for the delivery of the cars to the railroad company. The error in the latter proposition is as apparent as in the former, and in both it is too obvious to require further elucidation. The proofs show that the defendant was the agent of the railroad company for the purpose of contracting for such an amount and kind of rolling stock as he might deem expedient but there is no proof whatever in the case that he was the general agent of the company. The general agent and superintendent of the company resided at Hannibal, in the State of Missouri, and the agreed statement shows, that he contracted in behalf of the corporation for other cars which contained the improvement of the plaintiff, and that the same were used by the corporation. The independent power of the defendant upon that subject was exhausted when he had made the contract for the twenty-six cars, and stipulated for their delivery within the time specified. The delivery was to be made by the contract to the railroad company, and it was not in the power of the defendant to rescind the contract, or countermand the delivery of the cars. When delivered, the property of the cars vested in the company; and having acquired both the property and the possession of the cars, it was the right of the company, and of their general agent and superintendent, to determine the question as to their use.

The corporation may be liable to the plaintiff for the unlawful use of the improvement; and so may their general agent and superintendent, if he has used the cars, or directed their use; but it will be in season to determine those questions, when they arise and come before the court.

In view of the whole case, I am of the opinion that the defendant, under the agreed statement, is not liable in this action, and, according to the agreement of the parties, he is entitled to a verdict in his favor, and to judgment.

THE UNITED STATES v. THE BARK ISLA DE CUBA.

Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony upon the ground that any particular circumstance is irrelevant or of an inconclusive nature and tendency, are not favored, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other or with the direct proofs in the case.

Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.

Separate examination of circumstantial facts is indispensable in order to ascertain whether the facts themselves are fully proved, but the final determination of the issue or matter in controversy, cannot safely be placed entirely upon that examination.

In this case, which was a libel of information against a vessel for engaging in the slave-trade, the truth or falsity of the charge depends, not only upon a view of the circumstances attending the fitting, equipping, and loading of the vessel, but also of the circumstances of the voyage, and both of these must be weighed in connection with the declarations of the master, which are clearly admissible, and are by law to be regarded as direct evidence in cases of this description.

Declarations of the master of a vessel engaged in an illegal traffic, as to his suspicions that the purpose of the voyage was not legal, are not mere opinions, but rather admissions; and where he occupies to the vessel the double relation of owner and master, are clearly admissible in evidence.

THIS was a libel of information filed in the court below against the bark Isla de Cuba, her tackle, apparel, and furniture, as well as her cargo, claiming a forfeiture of the whole, for an alleged violation of the laws of the United States prohibiting the slave-trade. 1 Stat. at Large, 347; 3 Stat. at Large, 450. The libel was filed in the District Court on the 18th of October, 1858. It was charged that on the 1st of September previous, certain persons at the port of New York fitted out and equipped the bark, and otherwise prepared her for the purpose of procuring certain negroes or persons of color from a foreign country to be transported to a certain place, unknown, then and there to be held and sold as slaves; and that the said persons caused the bark so fitted out to sail from the port of New York, with the intent to employ the vessel for the purpose aforesaid, and in the aforesaid slave-trade.

Monition was duly issued, and on the 10th of November, 1858,

George M. Rea appeared and filed a claim to the vessel, her tackle, apparel, and furniture, by virtue of a mortgage executed to him by G. J. de la Figaniere, to secure originally, the sum of \$ 8,000, and that there was still due, together with interest, the sum of \$ 6,571.40. The attorney of J. S. Correa also filed a claim for the cargo of the vessel, stating therein that his principal was the true and *bona fide* owner of the same, and prayed that a decree of restitution might be entered in his favor. The vessel and cargo were both sold in the court below, and the proceeds paid into the registry.

The District Court sustained the libel, and entered a decree of condemnation and forfeiture, both against vessel and cargo; whereupon the claimants appealed to this court.

C. L. Woodbury, for the United States, cited *The Merino*, 9 Wheat. 398; *The Malek Addel*, 2 How. 233; *The St. Jago de Cuba*, 9 Wheat. 411; *The Venus*, 8 Cran. 253; *United States v. Ten Hogsheads of Rum*, 1 Gall. 191; *The Estrella*, 4 Wheat. 306; *The Robert Edwards*, 6 Wheat. 190.

In cases *in rem*, where forfeiture is claimed for an offence committed, the courts of the United States hold that claimants should be strictly held to rebut conclusively all the *prima facie* case made out. *The Josefa Segunda*, 5 Wheat. 354; *United States v. Schooner Catherine*, 2 Paine, 747; *Taylor et als. v. The United States*, 3 How. 197.

When the burden is thus changed, the defence must be brought clear of any reasonable doubt. *The Short Staple*, 1 Gall. 107; *United States v. Ten Hogsheads of Rum*, 1 Gall. 189. See also *Marcy v. Marcy*, 6 Met. 360; *American Fur Co. v. The United States*, 2 Pet. 363; *United States v. Gooding*, 12 Wheat. 468.

Sohier and Welch, and *Charles N. Black*, for appellants.

The United States must make out the charge beyond a reasonable doubt. *The Emily & Caroline*, 9 Wheat. 381.

So far as the fitting of the vessel is concerned, it must be shown to be inconsistent with any hypothesis of innocence. See *The Catherine*, 2 Paine, 747.

As to the master's declarations, see *United States v. Gooding*, 12 Wheat. 460; 1 Greenl. Ev. 114.

Transportation of any kind of goods to Africa is not a crime dependent of the intent with which it is done. *United States Libby*, 1 Wood & M. 221. See *Locke v. The United States*, 7 ran. 339.

CLIFFORD, J. The present register shows that the *Isla de Cuba* was built in New York in the year 1849, but the record of the case does not show who was the builder or the original owner. The claimants' proofs show that one G. J. de la Figuera, purporting to act as sole owner, on the 10th of November, 1857, mortgaged the vessel to one George M. Rea, to secure the sum of \$8,000, and they offer proofs tending to show that the sum mentioned in the claim for the vessel yet remains due and unpaid.

The libellants' proofs, however, show that one Jonathan Dobson, on the 6th of August, 1858, chartered the vessel to J. S. Correa for a voyage from the port of New York to the west coast of Africa and back, and that on the following day he took out register in his own name, in which he made oath that he was the only owner of the vessel. He was also the master, and the oath signed by him in that capacity, and the manifest which he presented to the collector, represent the intended voyage as one from the port of New York to Loango, which is on the west coast of Africa. The theory of the claimants is that J. S. Correa freighted the vessel, and the proofs show that the business was transacted in his name.

The vessel sailed from the port of New York on the 10th of August, 1858, with three passengers and a supercargo on board, in addition to the master and crew. The United States charge that she was fitted out and sailed from the port of departure to engage in the slave-trade, and they insist that the proofs fully establish the fact that such was the intent of her fitment, equipment, and voyage. The counsel of the claimants deny the entire proposition, and insist that the decree of the District Court was erroneous, and should be reversed. The owner of the vessel presents no claim, and the proofs afford no explanation of the fact which is consistent with the theory of the claimants. The charter-party represents the voyage as one from the port of

New York to port or ports on the west coast of Africa between Cape de Verde on the north, and Cape Lopez on the south, and yet the bill of lading and the manifest extend the limits on the coast, to a point five degrees farther south, which of itself is a circumstance of suspicion. The ownership of the cargo and the existence of the mortgage as a subsisting lien upon the vessel, are not satisfactorily established, and the failure to advance further proofs upon those topics is well calculated to create distrust as to the *bona fides* of the respective claims; but it is not necessary to place the decision of the cause upon any of those grounds, because I am of the opinion that the fitment of the vessel, the circumstances of the voyage, and the declarations and conduct of the master and those on board, afford the most conclusive evidence that every charge in the libel is true, beyond every reasonable doubt. A statement of conclusions is perhaps sufficient and all that is desirable to the parties; but in view of the whole case, it seems expedient to enter briefly into the details of the evidence, although the question is purely one of fact. A suspicion arises from the manner in which the cargo was stowed. The evidence shows that the ground tier of casks was carefully arranged according to sizes, so as to present on the top a uniform surface like a deck; and there were four tiers of boards, constituting a platform, placed on the barrels, two fore and aft, and two athwart ship, which had the effect to convert the whole length and breadth of the hold of the ship into a substantial deck, where negroes might conveniently be carried on the voyage. The documents show that the casks under that platform contained about twenty-two thousand gallons of fresh water, and the mate testified that the master informed him that ninety of the casks containing the water, were cleared as oil casks. The platform of boards was cut through in one place, as if to form a hatchway to get at the casks containing the water. The cargo on the return of the vessel was found to contain more than seventy barrels of rice, although it appears that twelve barrels had been sold at Fayal, in the course of the voyage. When the vessel sailed she had on board only a small quantity of beans shipped by the passengers, but an additional quantity of ten or eleven sacks was purchased at Saint Michael's, and taken on board

at that port, where the vessel stopped for a short time. The vessel also had on board fifty boxes of herring, and fifty boxes of cod-fish, and most or all kinds of provisions usually found in a vessel engaged in a slave voyage. Four large boilers were also found on board in boxes, with all the necessary apparatus for cooking, and the cargo also included some ten dozen pails or buckets, and seventeen crates of crockery, embracing every variety which would be necessary and convenient, in supplying and serving the negroes with food and water. Muskets, swords, and cutlasses were also found on board, packed in boxes and stowed as cargo, and another box containing a considerable quantity of iron rods fitted for grating, and such as might conveniently be used to surround the main hatch, was also found on board. None of these boxes are on the manifest, nor does it appear by what means or under what pretence, they were shipped and stowed as cargo. The owners, shippers, or consignors of the cargo on board a vessel bound to a foreign place, are required by law, before a clearance shall be granted, to deliver to the collector manifests of the cargo, and verify the same by oath or affirmation. The requirement is also, that such manifests shall specify the kinds and quantities of the articles, and the value of the total quantity of each kind. The oath or affirmation required is, that such manifest contains a full, just, and true account of all articles laden on board such vessel, and that the values of the articles are truly stated, according to their actual cost at the port and time of exportation. 3 Stat. at Large, 542. The circumstances indicate that the boxes, as well as other articles hereafter to be mentioned, were shipped and cleared through fraud and perjury. The freight was taken on board at different places, the vessel moving from one wharf to another for that purpose as many as three or four times, which, of course, afforded unusual facilities for shipping articles of a suspicious character, without attracting the attention of the revenue officers or the public. Four boxes of medicines, in addition to the usual medicine-chest for the ship's company, were also found on board, containing all or nearly all the ingredients usually found in vessels fitted out for the slave-trade and engaged in that traffic. The medicine-chest was well

supplied, and no satisfactory explanation is given why this large additional quantity was shipped, nor of the fact that none of the boxes are placed on the manifest. Two principal suggestions are put forth as explanations to obviate or rebut the inference drawn by the United States, from the shipment of the various articles mentioned, and the circumstances under which the shipment was made. All these articles, it is said in the first place, are sometimes if not frequently found in vessels engaged in lawful trade along that coast; and secondly, that the facts themselves as proved are of an inconclusive nature and tendency, and really ought to be considered as irrelevant. Such articles, it may well be admitted, are not infrequently shipped for lawful commerce in that trade, but it is scarcely to be conceived that such a shipment, without more, was ever made under similar circumstances and coincidences. The bark had a small cargo of merchandise other than the articles already mentioned; but the great weight of the evidence, while it clearly authorizes the theory that as a whole it was suitable for the illegal purpose charged in the libel, also fully warrants the conclusion, that as a lawful commercial adventure to that coast, it was insufficient in quantity, and very unwisely selected, because a considerable portion of the articles was either unsalable, or was in undue proportion to the rest of the cargo. Fresh water is not an article shipped for sale, and the iron rods for grating were much better suited to surround the main hatch, and thus convert the hold of the ship into a close prison, than for any known lawful purpose connected with such a voyage. Boilers and medicines may doubtless be sold in those markets; but if intended for that purpose, some explanation ought to be given why the boxes containing the articles were not placed on the manifest, as it fully appears that they are articles usually selected as cargo for that trade. The first explanation of the claimants, therefore, is not satisfactory; and the second is no better, and in point of fact is entitled to less consideration. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry, or the failure of direct proof, objections to testimony, upon the ground that any particular circumstance is irrelevant or of an inconclusive nature

and tendency, are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other or with the direct proofs in the case. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. *Castle v. Bullard*, 23 How. 187. The separate examination of circumstantial facts is indispensable, in order to ascertain whether the facts themselves are fully proved; but the final determination of the issue or matter in controversy, cannot safely be placed entirely upon that examination. Whether matters of fact are submitted to courts or jurors, they should be determined upon the whole evidence given; and in this case the truth or falsity of the charge depends, not only upon a view of the circumstances attending the fitting, equipping, and loading of the vessel, but also of the circumstances of the voyage, and both must be weighed in connection with the declarations of the master, which are clearly admissible, and are, by law, to be regarded as direct evidence in cases of this description. *United States v. Gooding*, 12 Whea. 460. The witnesses speak of the number of the passengers as four; and if J. S. Correa, sometimes mentioned as supercargo, be regarded as such, then the witnesses are correct. Three were Portuguese, and one was a Spaniard. The mate testifies that the vessel arrived at Fayal on September 2, 1858; and it was while the vessel was lying there in the stream that the twelve barrels of rice were sold. While there, also, another passenger came on board, Jacob M. Smalley, who is an important witness for the United States. The master and passengers went ashore once or twice. The attention of the mate was called by the master to the fact that the documents of the supposed supercargo showed, that there were twenty-two thousand gallons of fresh water in the hold of the vessel, and he (the mate) was requested to examine and ascertain if such was the fact. Accordingly he made the examination, and found the fact to be as represented, or that some of the casks at least contained fresh water, and he so informed the master. Notwithstanding this discovery, the vessel

proceeded on her voyage to the port of Saint Michael's, but the suspicions of the master were greatly aroused as to the character and intent of the voyage. They arrived at Saint Michael's on the 12th of the same month, and while there the passengers from the port of departure, purchased the sacks of beans, which were added to the cargo. Twenty-seven bales of the dry goods were there discharged, and converted into money. A conversation there took place between the master and the mate in regard to the character of the voyage, in which the former told the latter that he suspected that the voyage was an illegal one, and in that view of the matter the latter substantially concurred. Smalley's testimony shows that the passage from Fayal to Saint Michael's was accomplished in twenty-four hours. During that time he had various conversations with the master, which in substance and effect show that the master felt himself in danger from the four foreigners on board as passengers, and so deep were his convictions, in that behalf, that he cautioned the witness not to drink any of the wine at dinner, unless he, the witness, first saw him, the master, drink from the same vessel, assigning as a reason for his fears, that they had attempted to poison him at Fayal while the vessel lay there, and expressing the opinion that they intended to use poison to accomplish their purpose. Precautions were taken by the master to guard against assassination or violence from that quarter; and to that end the witness states that he, the master, requested the mate to have his axe in readiness for use, and also requested the cabin-boy to sleep with a hatchet under his pillow; and so strongly were his fears aroused as to the danger, that he requested the witness to remain awake while he, the master, slept, and agreed himself to remain awake while the witness slept. The testimony shows that the bark remained at Saint Michael's for the period of ten days, and that while there, he gave up the command to the mate, under the sanction of the American consul, and left the vessel. When he gave up the command, he cautioned the mate to keep all of the papers out of the way of those passengers, assigning as a reason for the caution, that he suspected that the vessel was engaged in an illegal voyage. The statement of the mate is that when the master

surrendered the command to him, he gave him an order to sail for New York, as he, the master, considered the voyage illegal. The objection is made that these declarations are not admissible, but it should be remembered that he was not only master of the vessel, but her sole owner. His opinions, it is said, are not admissible, but the declarations of a person occupying the double relation of master of the vessel and sole owner are clearly competent, and it is as declarations or admissions, and not as opinions, that the evidence is in the case, and in that point of view it is admissible. Having surrendered the command, he left the vessel, and the mate became the acting master. Three days afterwards he called these passengers and all hands forward, and told them he was going to take the vessel to the United States, because he considered that the voyage to the coast of Africa was a voyage for slaves. The passengers at once began to cry, and one of them said he thought the late master had told him where the vessel was going, and all about the voyage. The witness told them he did know all about the voyage, and in effect gave them to understand that it was on that account that he was about to return. They begged him to run into Flores, and put them ashore, but he refused, saying that he was quite near enough to land, and that he would not go any nearer. But he offered them a boat of four or five tons, which they accepted. The vessel was then about one hundred and twenty miles from Flores, and they left in the boat, taking one or two bales of goods, two or three barrels of rice, some fish, and other provisions, and five or six trunks which contained their baggage. Before they left, however, J. S. Correa, the present claimant, made a bill of sale to the mate of all the cargo left on board. His claim is that the voyage was a legal one, and that he was the *bona fide* owner of all the cargo; and yet upon being informed by the mate that he was going to take the vessel to the United States as a slaver, he voluntarily parts with all his property, except the small parcels before mentioned, and in the open sea, when the ship was in no danger, leaves her deck and takes his chance to reach the shore in an open boat of four or five tons. The parties have a right to set up such a defence and urge it upon the consideration of the

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court, but they can hardly expect the court to adopt any such improbable theory. Nothing need be added respecting the declarations of the master, except to remark, that the testimony is full to the effect that he repeatedly said that the voyage was an illegal one, and was for the purpose of procuring slaves, or words to that effect; and on one occasion he showed his letter of instructions to the witness Smalley, which, if the contents are correctly given, showed to a demonstration that such was the fact.

In view of the whole case, I am of the opinion that the whole charge as laid in the libel is proved beyond any reasonable doubt.

The decree of the District Court is, therefore, affirmed with costs.



THE UNION SUGAR REFINERY v. FRANCIS O. MATHIESSON *et al.*

Under the eleventh section of the Judiciary Act, when a party defendant is found in the district where the process issued, although not a resident thereof, he may lawfully be served with the process; but it cannot properly be said that he was found there, if he was inveigled or enticed into the district by false representations or deceitful contrivances, for the purpose of making such service upon him.

The general rule is, that a person illegally in custody at the suit of one party, is not privileged from arrest at the suit of another, except there be proof of concert or collusion; but prior illegal arrest and subsequent detention will render the service illegal, and entitle the defendant to an unconditional discharge.

Courts of justice everywhere regard the employment of one legal process as a means of detaining a party till a second can be served upon him, such an abuse of the process as to render the second service unavailing; but whether the defendant is also entitled upon an *ex parte* application, to a discharge from the prior service as well, *quære*.

Where an inventor who had assigned his invention to certain third parties, invited the defendant, an infringer, into the jurisdiction where the assignees resided, for the avowed purpose of settling the controversy, but without the knowledge of such assignees, and procured an interview between the parties, at the close of which the defendant was served with process in consequence of such infringement, *held*, there was not sufficient evidence of deceptive contrivances to obtain service on the defendant, and that a motion to dismiss the action on that account must be overruled.

TRESPASS on the case for the alleged infringement of certain letters-patent. The plaintiff corporation was a citizen of this district, and the defendants of New Jersey, the former having a place of business at Charlestown, the latter a residence in Jersey

City, but service of the writ was made on the first-named defendant at Boston, in this district, under process returnable to this court. After entry the defendant appeared specially and moved the court that the service of the writ upon him be set aside, and that the action be stricken from the docket, on the ground that the service was illegal and void, because obtained by false representations and deceptive contrivances, in consequence of which the defendant was enticed into this district, with the design to have him so served with the process, and because he was so served in pursuance of such fraudulent plan and design. Testimony was taken by both parties under the direction of the court, and at this term the cause was heard.

The plaintiff assumed that service was made under the eleventh section of the Judiciary Act, allowing civil suits to be brought before the courts of the United States against an inhabitant thereof by original process in the district in which the defendant may be found at the time of serving the writ. The following was the substance of the testimony:—

The inventor of the improvement which was the subject of dispute, one Gustavus A. Jasper, before he obtained letters-patent, assigned his invention to the corporation plaintiffs, who secured the patent, and held the invention under reissued letters-patent at the time of the trial. When the assignment was made, it was orally agreed that the plaintiffs should pay the assignor one half of the net proceeds of the sale or grant of all licenses or privileges of using the invention under the patent, when obtained, and this was subsequently embodied in a written agreement. The defendant had been using the invention without license before the date of the assignment to the plaintiffs, before of course the issue of the patent and down to the date of the writ. Objection to this use was made by the officers of the corporation, and interviews between the president and one of the directors and the defendant had taken place. The corporation demanded a substantial price for the use of the invention by the defendant, while he was willing to pay only a nominal sum; and therefore no settlement could be effected.

The inventor and the defendant were intimate friends, had

been in the habit of interchanging visits, and in the fall of 1863 the former invited the latter to visit him at Charlestown, in this district. The defendant, in reply, expressed his intention of accepting the invitation. In December of the same year the inventor again wrote the defendant, renewing the invitation, and also expressing the wish that he, the defendant, and the corporation might adjust the dispute about the patent, and requesting him to have an interview with the company for that end. Furthermore, he advised the defendant to treat with the before-named director, and not with the president. On the following day the inventor addressed another letter to the defendant, of similar purport.

On the 16th of the month the defendant arrived at Charlestown, and he and the inventor called upon the president of the corporation, but nothing was said either about settling the controversy or bringing a suit. Three or four hours later the same two parties called upon the before-named director, but no settlement of the infringement was made; and as the inventor and defendant left the office of the director, service of the writ in this case, which had been procured by the president since the call upon him, but without the knowledge of the director, was made upon the defendant.

The evidence showed that the officers of the corporation were ignorant of the invitation extended by Jasper to the defendant to visit Charlestown, and it was not pretended that he had any expectation or thought that in so doing he would afford the corporation an opportunity of obtaining service of a writ upon the defendant.

*B. R. Curtis, Chauncey Smith, Preston, and Kimball, for plaintiff.
Browne and Maynadier, for defendant.*

CLIFFORD, J. Under the provisions of the eleventh section of the Judiciary Act, 1 Stat. at Large, 79, it is clearly the right of the plaintiff to serve the defendant with process in the district where the plaintiff resides, provided the process be in proper form, and the defendant be found in that district, within the true intent and meaning of that provision. The argument of the defendant admits the proposition as stated, and it is so obvious

that it is correct that the statement of it furnishes all the explanation that is required in its support. Withdraw that right from the plaintiff, and the consequence would immediately follow that a defendant, although a citizen of another State, might evade service indefinitely by fleeing into the district where the plaintiff resides, and by remaining there until he could secrete or convey all his property, might defeat all means of rendering available any judgment which the plaintiff might recover against him in the Federal courts. The right secured, therefore, by the provision, is plainly one of importance, and one that ought not to be impaired or frittered away by construction. Important as the right is, however, it must not be forgotten that it is conferred only under the special circumstances described in the provision, and if those circumstances are wanting, then the right does not exist. When the party defendant is found in such district, he may then be lawfully served with process; but it cannot be said that he was so found there, if he was inveigled or enticed into the district for the purpose of making such service upon him, by false representations and deceitful contrivances of the plaintiff in the suit, or by any one acting in his behalf. Abuse of legal process in any form has always been frowned upon by courts of justice, whenever and wherever the fact has been made to appear, and the party practising it is never allowed to reap the fruits of his wrongful act. Where the defendant was first arrested without process, and detained until process could be procured, and while so unlawfully detained was served with legal process, it was held that inasmuch as the original arrest was illegal, the subsequent confinement under legal process was also illegal; and the defendant accordingly was unconditionally discharged. *Barlow v. Hall*, 2 Anstr. R. 461. The arrest was also held illegal, and the defendant discharged, in *Birch et al. v. Prodger*, 1 New R. 135, because the defendant was first seized by the plaintiff in the street, and carried by him to the office of an attorney, and there detained until the process already issued and in the hands of the officer could be sent for and served. See also *Loveridge v. Plais-tow*, 2 H. Bl. 29. The general rule, however, is that a person illegally in custody at the suit of one party, is not privileged

from arrest at the suit of another, unless there is some proof of concert or collusion; because in the absence of such proof it cannot be assumed that the latter party has been guilty of any abuse of legal process or of any wrongful act whatever. *Barclay v. Faber*, 2 B. & A. 743; *Howson v. Walker*, 2 W. Bl. 823; *Davies v. Chippendale*, 2 Bos. & Pul. 282; *Eggenton's case*, 2 El. & Bl. 735. The rule, of course, would be otherwise if the party was not subject to arrest, as is admitted in all the cases establishing the preceding general rule. *Spence v. Stuart*, 3 East, 89. Improper contrivance also, as well as a prior illegal arrest and subsequent detention, will render the service illegal, and entitle the defendant to an unconditional discharge. Consequently, where a respondent in an equity suit was in contempt for not filing an answer, and the complainant having procured an order of attachment against him, and being unable to serve it, caused the respondent to be personally examined in certain insolvent proceedings pending against him in another tribunal, and as the respondent retired from the room after his examination, served him with the attachment process, it was held that the arrest was illegal, and that he should be discharged, because he had been arrested by a deceptive and improper contrivance. *Snelling v. Watrous*, 2 Paige, Ch. 314. The same principle is also laid down in *Wells v. Gurney*, 8 Barn. & Cress. 769, where it was held that a defendant, arrested on Sunday for an assault actually committed, but for the real purpose of detaining the defendant until Monday, so that he might be arrested in a civil suit, was entitled to a discharge from the arrest in the civil suit, because the arrest had been effected by an abuse of legal process and by deceptive means. Courts of justice everywhere regard the procurement and use of one legal process merely for the purpose of arresting a party and detaining him in custody until he can be served with another process, as such an abuse of process as will at least render the second service utterly unavailing to the party making it; and cases may be found where it has been held that the party arrested was entitled to be discharged from both upon an *ex parte* application to the court. *Ex parte Wilson*, 1 Atk. Ch. 152. Whether or not the rule ought to be extended so far, it is not

necessary now to determine, but it is clear that the service of the latter process in the case stated was illegal, and was properly set aside. Several cases also are cited by the defendant, in which it was held that if a party upon whom process is served, and who at the time was residing in another jurisdiction, was induced to come into the jurisdiction of the court where the suit was commenced, by a deception practised upon him by the plaintiff for the purpose of serving the process, such service is not good, and that the court will set it aside and dismiss the suit. Such were the views of the court in *Williams v. Reed*, 5 Dutch. (N. J.) 385, which is a case directly in point under the theory of fact set forth in the motion. Express adjudication to the same effect is also to be found in *Carpenter v. Spooner*, 2 Sandf. 717, which is entitled to much weight. An examination of these cases and others cited by the defendant satisfies the court that the proposition of the defendant, as stated in the motion, is correct that, where the defendant, residing in another district, is inveigled, enticed, and induced to come into the district where the plaintiff resides, by the false representations or deceptive contrivances of the plaintiff, or of any one acting in his behalf, for the purpose of serving legal process upon the defendant, and the same is served through such improper means, such service is illegal and ought to be set aside, and that the process should be dismissed. But the proofs in this case do not show that the defendant was first seized without process, and detained until process could be obtained and served, nor that he was arrested and held upon process obtained for the mere purpose of so arresting and detaining him until the process in question could be obtained, and served upon him. Nor do the proofs show that the plaintiffs or any one in their behalf, were guilty of any misrepresentations or practised any deceptive contrivances to entice or inveigle the defendant into this district to serve him with the process under consideration. All these conclusions of fact are admitted by the defendant, and, in admitting them, he also admits, in the view of the court, that his motion must be denied.

The proposition of the defendant is that the inventor is interested in the patent, and that, inasmuch as he invited the defend-

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ant to come into this district, and the defendant came in pursuance of such invitation, neither the corporation nor its officers, while he was here under that invitation, could sue out process returnable in this court, and cause the same to be served upon the defendant. The argument is that the inventor, although he had assigned the entire legal title to the corporation, nevertheless, under the agreement before mentioned, sustained to the corporation the relation of a partner in interest, and that, sustaining that relation, and having invited the defendant to come here, the corporation could not sue out process here and make service upon the defendant under the before-mentioned provision of the Judiciary Act. But the proposition cannot be sustained for several reasons, any one of which is conclusive against it, and sufficient to show that it is wholly untenable. The corporation held the entire legal title to the patent, and consequently had the exclusive right to determine whether or not a suit should be instituted. They had no knowledge of the acts of the inventor, and, as the inventor was not their agent in any sense, they could not be affected by his acts. He did not profess to act as their agent, and did not act in their behalf, which was well known to the defendant. Neither the corporation nor its officers committed any wrongful act either in suing out the process, or in directing it to be served by the marshal. The inventor did no wrongful act in writing the letters, or in extending the invitation to the defendant to come here and make an effort to adjust the controversy, as all he did and said was merely advisory, and without any improper intent. Where there is no false representation and no deceptive contrivance and no wrongful act of any kind done by the plaintiff, or by any other person in his behalf, to entice, inveigle, or induce the defendant to come into the jurisdiction where the plaintiff resides, for the purpose of serving him with process, it is competent for the plaintiff to sue out process and have it served; and such service is legal, and cannot be set aside, or the process dismissed, because made returnable and served in the district where the plaintiff resides.

The motion is overruled and denied.

OCTOBER TERM, 1864.

ABBY R. LORING, MARION W. LORING, and ELIJAH JAMES LORING,
 Infants, by CHRISTIAN W. LORING, their Mother and Next
 Friend, v. LEVI H. MARSH, PETER RENTON, and CERTAIN
 CHARITABLE INSTITUTIONS.

The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, are to be regarded as the rules of decision in trials at common law in the courts of the United States, in cases where they apply.

In cases depending upon the statute of a State, especially in those respecting the titles to land, the Federal courts will adopt the construction of the State courts, when that construction is settled or can be ascertained.

The same rule prevails in suits in equity as at law.

The natural import of the words in the Judiciary Act includes the laws in relation to evidence as well as the laws in relation to property.

The construction given to a State statute of the description mentioned, by the State court, is regarded as a part of the statute, and is as obligatory on the courts of the United States as the text; and if the State court adopts new views as to the construction of such a statute, the Federal courts will follow the latest settled adjudication.

The decisions of the State courts, however, cannot be allowed to retroact upon the judgments of the Federal courts. The Supreme Court will not reverse its own judgment in a case depending upon the local law, if correctly given at the time in accordance with the settled construction given to the law by the State court, even should it appear that the State court subsequently changed its views, and adopted a different construction.

The same is true of the decisions of the Circuit Courts.

In the absence of any construction of a State statute by the State court, the Federal courts derive their rules from the common law.

Therefore, in an equity suit in this court, in which a motion for continuance was filed, upon the ground that a prior suit was pending in the Supreme Court of the State, depending upon the local law, between the same parties, and involving the same subject-matter, and until such cause might there be heard and determined, *held*, there was no occasion for continuance, because this court, in such case, must follow the construction given to the provision of the local law by the State court, if it can be ascertained; but if it cannot, then the duty of determining the true construction of the provision in question devolves first on this court, and finally on the Supreme Court.

Comments upon *Presbyterian Church v. White's Administrators*, 4 Law Reg. 526.

The Circuit Court has no discretionary power to stay a suit in equity brought therein, or to refuse jurisdiction, on the ground that a prior suit involving the same subject-matter, and between the same parties, is pending in the State court of the district where the Circuit Court is held.

There are cases in which it has been held that the pendency of another suit, between the same parties, for the same matter, in another jurisdiction, may be pleaded in bar or in abatement to a second suit.

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The rule in this circuit has always been, that the pendency of another action for the same cause in a State court is not a good plea in abatement.

A priori a motion for a continuance, upon the ground of the pendency of another suit in the State court, cannot be granted here, when it appears to the court that the nature of the proceedings are different, the parties not the same, and there are questions presented for decision not involved in the suit in the State court.

Where, from an inspection of the pleadings which had been regularly filed under the rules, in an equity suit, the court can see that different questions are raised from those presented in a suit in the State court, and pending at the same time, a motion to refer the case to a master, with directions to inquire whether the subject-matter and parties were not the same in the two actions, must be denied.

BILL in equity. The case at this time came before the court upon a motion of the respondents, that the case might be continued until a prior suit in equity, pending in the Supreme Judicial Court of the State, should be heard and determined. Should that motion be denied, then the respondents moved that the court should order the cause to be referred to a master, with directions to report whether the cases were upon the same matter and between the same parties. As a foundation of the motion for continuance, it was alleged that the bill of complaint in the State court was first filed; that the parties to the respective suits were the same, and that in substance and effect the subject-matter was also the same. The motion set forth that the subject-matter of both suits was the construction of the will and devise described in the bills of complaint, and that the same questions of law and fact were presented in the State court as were involved in the pleadings and proofs in this record. The suggestion was that the questions presented depended upon the local law; and the argument in support of the motion was in brief, that inasmuch as the Federal courts, in construing a State statute constituting a rule of property, uniformly adopt as a part of the statute the settled construction given to it by the State court, it became the duty of the court here, in the exercise of its discretion, to decline to hear the parties in this cause, until the questions presented in the record arising under the local law had been fully settled by the State court.

The will referred to in the motion and described in the bill of complaint was that of Abigail Loring, widow of Elijah N. Loring, formerly of the city of Boston, in this district. The record

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showed that she made her will on the 19th of October, 1858, and a codicil on the 14th of July of the following year. In view of the case as at this time presented, it is only necessary to notice the following provisions of the will: "All the rest, residue, and remainder of all my estate and property, real and personal, I give, devise, and bequeath unto Levi I. Marsh and Samuel E. Guild, both of said Boston, to have and to hold the same, to them and the survivor of them and their heirs and assigns forever, to their own use, but in trust for, under, and for the following purposes, trusts, and limitations, to wit, to hold, manage, invest, and reinvest the same according to their best discretion, and to pay over" to each of her three children, Abby M. Loring, Cornelia W. Thompson, and Josiah Q. Loring, one third of the net income therefrom during their several lives. There was also a provision that, "upon the decease of my said children severally, the shares of said income which they would continue to take if living shall be retained and invested by the trustees until the decease of my last surviving child, and shall then, with the principal or trust fund, be disposed of for the benefit of the poor in the manner hereinafter provided." The remaining provision material to be noticed was that "when, upon the decease of all my children, the trust fund to be disposed of as aforesaid, the said Marsh and Guild, or their successors as trustees, shall select and appoint three or more gentlemen, who shall be informed of the facts by the trustees, and shall determine how by the payment to permanently established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect."

The first-named trustee was also appointed executor, and in request of the testatrix as expressed in the will was, that he should be exempted from giving sureties on his official bond.

The testatrix died on the 8th of November, 1862, seised and possessed of a large amount of real and personal estate. The pleadings showed that the daughter, Cornelia W. Thompson, died on the 10th of June, 1859, without issue, and that her son Josiah Q. Loring died on the 6th of April, 1862,

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leaving three children, who were the complainants mentioned in the bill of complaint. The case also showed that Abby M. Loring, the other daughter mentioned in the will, died on the 2d of June, 1863, unmarried, and that Peter Renton was duly appointed administrator of her estate. Further, the complainants alleged that Samuel E. Guild, one of the trustees, died on the 16th of July, 1862, and the fact was not controverted. Abbie R. Loring, Marion W. Loring, and Elijah James Loring, infants, who brought this suit by Christian W. Loring, their mother and *prochein ami*, were the parties complainant. They were children of Josiah Q. Loring, deceased, and both they and their mother were alleged to be citizens of the State of New York. The respondents were Levi H. Marsh, the surviving trustee, and Peter Renton, administrator of the estate of Abby M. Loring, both of Boston, in this district, and citizens of the Commonwealth of Massachusetts, together with certain corporations and associations subsequently made parties respondent under an amendment allowed by the court.

The suit in the State court was a bill of interpleader, brought by the said Levi H. Marsh as executor and trustee under the will of the said Abigail Loring. The bill of complaint as exhibited in this record alleged that Peter Renton, administrator as aforesaid, was also the duly appointed guardian of the said minors, and contained the proper allegations to make the said Peter Renton and the said minors and the several corporations and associations before mentioned parties respondent. The transcript of the record from the State court also showed that Peter Renton appeared in the suit and filed his answer, which he alleged that the complainants in this suit, Abby Loring, Marion W. Loring, and Elijah James Loring, were respondents and citizens of the State of New York, and that they had no place of residence in this Commonwealth. Service was made upon them; but it appeared that the State court, on 24th of October, 1864, passed an order that they should answer and answer the bill of complaint within one month from the date of the order, and that the complainants serve them with notice thereof by the usual publication as therein directed. A

other things, the complainants in the case alleged that all the valid and legal trusts created and declared by said will had ceased and determined, and that they and Abbie M. Loring, whose administrator Peter Renton then was, were the sole heirs at law of Abigail Loring; that the property in the hands of Levi H. Marsh, as trustee under the will, rightfully belonged to them and to said Renton, as administrator as aforesaid, and that it was the duty of said Marsh to convey, transfer, and deliver the same in pursuance of that rightful claim.

The prayer of the bill of complaint was that Marsh might be decreed to account with the complainants and pay over to them their shares of the property and money so held by him in trust, and as such trustee under the will.

In the suit pending in the State court, the complainant alleged that he accepted the trust, and was duly appointed executor; that he paid the bequests mentioned in the will which precede the clause disposing of all the rest, residue, and remainder of all her estate and property; that the other trustee and the parties entitled to the life estate, having deceased, he proceeded to execute the trust in accordance with the other provisions of the will, to which reference has already been made; that he accordingly selected and appointed three persons as therein directed, to determine the payments to be made; that they accepted the appointment, were duly informed of the facts by the complainant, and advised, made, and declared in writing to the trustee the distribution of the trust fund as therein set forth and described. It should be remarked that the distributees of the funds as therein declared, were the several corporations and associations made respondents in the respective bills of complaint. The before-named complainant also alleged that Peter Renton as administrator and guardian, and the minor children, had demanded of him the transfer, conveyance, and payment to them of the moneys and estates in his hands as trustee under the said will, claiming to be entitled to the full possession and enjoyment of the same, and alleging that the said devise for the benefit of the poor was null and void. Following these averments was the formal allegation that he was ready to

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convey, transfer, and pay over said trust estate to whomsoever was entitled thereto, but that he was advised that he could not safely convey or pay over the same to any of the said parties. Wherefore he prayed that the respondents might be decreed to interplead together, and that it might be ascertained in such manner as the court should direct, to which of them the said trust estate ought to be conveyed and assigned.

B. R. Curtis, C. Cushing, and Hutchings and Wheeler, for complainants.

Sidney Bartlett, F. C. Loring, and C. W. Loring, for respondents.

CLIFFORD, J. Assuming all to be true that is alleged in the motion, still the argument in support of it is based upon the assumption, that the questions arising under the local law are undetermined; and of course it concedes that, if the fact be otherwise, that if no such questions are involved, or, if involved, that they have already been determined, the court here may properly proceed to hear and determine the cause. The theory of the motion is that the construction of the will and devise referred to in the motion depend upon the local law, and that the cause should be continued until the State court shall determine what is the true intent and meaning of the local law upon that subject, and not that there is any conflict of jurisdiction, arising out of the fact that the bill of interpleader was filed in the State court two days before the bill of complaint was filed in this court. Careful attention to the precise theory of the written motion will very much facilitate the proper application of decided cases to the question presented for decision.

“When a testator omits to provide in his will for any of his children, or for the issue of a deceased child,” the Massachusetts Statute of Wills provides that “they shall take the same shares of his estate, both real and personal, that they would have been entitled to if he had died intestate, unless they shall have been provided for by the testator in his lifetime, or unless it appears that such omission was intentional, and not occasioned by accident or mistake. Gen. Stat. § 25, p. 478; Rev. Stat. c. 62, § 21. The theory of the complainants here is that the

devise for the benefit of the poor, under the circumstances disclosed in the pleadings, cannot be executed, and that in fact it is null and void. They also insist that under the provision referred to in the Massachusetts Statute of Wills, they take the same share of the estate, both real and personal, that they would have been entitled to, if the testatrix had died intestate. The respondents deny both propositions, and insist that the devise in question has been duly executed, and that it is neither void nor voidable; and they also deny that the Statute of Wills gives the complainants any portion of the property, real or personal, of the deceased. Where a child has no share given him or her in the will, the Supreme Court of the State hold that he shall have a share, unless it is manifest from the other parts of the will or other evidence that the omission was intentional, and not occasioned by accident or mistake. *Wilson v. Fosket*, 6 Met. 400. The Supreme Court of the State have also held that the provision in the Statute of Wills already recited applies to a child or children born after the making of the will, and before the death of the father, and gives him or them the same rights as those have who were born before the will was made. Able counsel maintained the contrary, but the court was of the opinion that, in adopting that provision, it was not the intention of the legislature to alter the law in that respect, but only to give effect to the old statute, and give the authority of positive law to the construction which had previously been put upon it by the courts of the State. The proposition attempted to be maintained in the argument was, that by the term "omits to provide in his will," was meant a child then living, but the court held otherwise, and the chief justice, who delivered the opinion, remarked that a man's will is ambulatory until his decease, as it may be revoked, republished, altered, or modified by any codicil or number of codicils, quite up to the time of his death. The conclusion of the court was, that the time to which the question of omission applies is the time of the testator's decease, and the construction upon that subject may be regarded as settled beyond dispute. *Bancroft v. Ives*, 3 Gray, 367. Children, therefore, born after the will of their father was made, if before his death,

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unless provided for in some subsequent codicil, are as much entitled to the benefit of that provision as those who were born before the will was made. Granting that to be so, still the respondents insist that the construction given does not authorize the conclusion that the complainants, who are grandchildren of the testatrix, must come within the same rule, although the case shows that they were severally born, and that their father deceased in the lifetime of the testatrix. Looking at the whole case, it is clear that there are questions presented in this record which are not involved in the record in the State court, and which cannot be decided there under the pleadings exhibited in this case. On the other hand, it is equally clear that there is a question common to both cases, and that that question is one which has not been directly decided by the State court, and that it depends upon the construction of the local law. Taking the case as stated, the question is, what is the proper course to be pursued? The counsel of the respondents insist that the cause should be continued; but the counsel of the complainants resist that proposition, and contend that, if granted, it is a denial of justice. The Circuit Courts have, under the Judiciary Act, original cognizance, with the courts of the several States, of all suits of a civil nature, at common law, or in equity, where the matter in dispute exceeds the sum or value of \$500, and the suit is between the citizens of the State where the suit is brought and citizens of another State. 1 Stat. at Large, 78. The record shows that the complainants are citizens of the State of New York, and that the respondents are citizens of this Commonwealth. Evidently, therefore, the case is one within the jurisdiction of the court, unless some new condition be interpolated into the provision in the act of Congress, by which jurisdiction is conferred. The continuance, if granted, must be to the next term, and from term to term indefinitely, until the expected adjudication is made. The principal respondent in this suit is a complainant in the suit in the State court. The service there has not been completed, and it may never be made, or the complainant may dismiss his bill of complaint or fail to prosecute with effect. Pending controversies, whether at law or in equity

are subject to many contingencies by which they may be retarded or prevented from being prosecuted to judgment, and yet the argument is that the cause must be continued indefinitely, until the question depending upon the local law is determined by the State court. The industry of counsel, however, has not furnished the court with any decided case which supports any such proposition, and the researches of the court in that behalf have not been attended with any better success. Undoubtedly the rule is that the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, are to be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. 1 Stat. at Large, 92. Consequently it was very early held, and has been so determined on many occasions, that in cases depending upon the statute of a State, especially in those respecting the titles to land, the Federal courts will adopt the construction of the State courts, where that construction is settled or can be ascertained. *Polk's Lessee v. Wendall*, 9 Cran. 87. The same rule prevails in suits in equity as at law, and in both it is the settled practice of the Supreme Court in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. *Elmendorf v. Taylor et als.*, 10 Wheat. 157. Justice to the citizens of the several States required this to be done, and the natural import of the words in the act of Congress includes the laws in relation to evidence as well as the laws in relation to property. *Vance v. Campbell*, 1 Black. 430; *Wright v. Bales*, 2 Black. 535. The construction given to a State statute of the description mentioned, by the State court, is regarded as a part of the statute, and is as obligatory on the courts of the United States as the text; and if the State court adopts new views as to the construction of such a statute, the Federal courts will follow the latest settled adjudication. *Leffingwell v. Warren*, 2 Black. 599; *United States v. Morrison*, 4 Pet. 124; *Green v. Neal's Lessee*, 6 Pet. 291. Decisions of the State courts, however, cannot be allowed to retroact upon the judgments of the Federal courts, and consequently the Supreme Court will not reverse its

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own judgment, even in a case depending upon the local law, if correctly rendered at the time, in accordance with the settled construction given to the law by the State court, although it may appear that the State court subsequently changed its views, and has adopted a different construction. The established rule also is that the judgment of the Circuit Court will not be reversed under like circumstances. *Morgan v. Curtenias*, 20 How. 3. Guides for the construction of the laws of Congress are furnished in the rules of the common law, and the same rules apply in the construction of a State statute, except in cases where the courts of the State have already furnished the construction. *Rice v. Railroad Company*, 1 Black. 374. The Supreme Court held, in *Charles River Bridge v. The Warren Bridge*, 11 Pet. 545, that the rules of the Federal courts for the construction of statutes were borrowed from the common law, and that rule is undoubtedly correct in all cases except where the courts of the State have previously determined the construction of a local law. See also 1 Story's Com. on Con. (3d ed.) § 158.

Applying those rules to the present case, there is no occasion for a continuance of the cause, because this court must follow the construction given to the provision by the State court, if it can be ascertained, and if not, then the duty of determining in this case what is the true construction is devolved in the first place upon this court, and finally upon the Supreme Court. Such has been the uniform practice of the court, and it is not perceived that there is any necessity for any change. Attempts have been made to maintain the proposition that, where there is a concurrent jurisdiction in the State court and in the Circuit Court, the latter has a discretionary power either to stay the suit or to refuse jurisdiction, but such attempts in this circuit have never been attended with any success. An example of such an attempt is to be found in the case of *Wadleigh v. Veazie*, 3 Sumn. 168, which was a writ of entry for the recovery of certain lands situated in the State of Maine. The defendant pleaded in abatement the pendency of a prior suit in the State court between the same parties for the same tract of land.

Judge Story held that a plea in abatement to a suit in the Circuit Court for the recovery of land, that another action in which the present defendant was plaintiff and the present plaintiff was defendant, was pending in the State court, was not a good plea, and, in disposing of the cause, he adverted to the suggestion made in the argument that it was competent for the court to order a stay of the suit, or to refuse jurisdiction. He remarked that he knew of no such authority; and if none such existed in that case where the only difference between the two suits consisted in the fact that the parties in the Circuit Court were reversed, it may well be assumed that none such can arise in any case within the jurisdiction of the court. "If the parties are rightfully before the court," said that learned judge, "in a case within its jurisdiction, however unpleasant it may be to entertain a suit here in regard to which there may possibly be a diversity both of verdict and judgment from those given in the State court, I know not how that is to be avoided." Attention has very properly been called, since the argument, to the case of the *Presbyterian Church v. White's Administrator*, 4 Am. Law Reg. 526, as asserting a contrary doctrine. The bill of complaint in that case was filed in the Circuit Court of the United States by the complainants against Samuel Settermaster, the administrator *de bonis non* with the will annexed. The facts are not very clearly stated, but the purpose of the suit was to enforce the payment of a bequest contained in the will. The defendant, it seems, had paid the debts of the deceased, and the other legacies mentioned in the will, and had on hand a certain sum to be applied to the bequest in question, if the same was valid. The answer alleged that the said amount was claimed by other persons, on the ground that the bequest was void, and that the respondent had filed a bill of interpleader in the county court, against all the parties, and that the same was still pending.

Under that state of the case the district judge, sitting in the Circuit Court, held that the rule of comity in such a case required that paramount authority should be yielded to the court before which the proceedings were first instituted; but he after-

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wards proceeded to examine the merits of the case, and having come to the conclusion that the bequest was void, entered a final decree, dismissing the bill of complaint with costs. "Courtesy requires," says the learned judge, "that paramount authority should be yielded to the court before which the proceedings were first instituted."

Doubts are entertained as to what is meant by the district judge in that part of the opinion; but if it must be understood as affirming that there is any discretionary authority vested in the Circuit Court to stay the suit under such circumstances or to refuse jurisdiction, it will be sufficient to say that it is not possible for this court to yield its assent to the proposition, and none of the authorities cited support it. Cases may unquestionably be found where it is held that the mere pendency of another suit for the same matter between the same parties in another jurisdiction, may be pleaded in abatement or in bar to a second suit. The decision in *Hart v. Granger*, 1 Conn. 154, was of that class, but the case has recently been distinctly overruled by the court in which it was made. *Hatch v. Spofford*, 22 Conn. 495. The English cases go no further than to hold that the plea of another suit depending will be good, if the first suit was instituted in the same jurisdiction. Such a plea is not a good one in the courts of that country, if the first suit is pending in another country, nor in the colonies of the parent country. *Maule v. Murray*, 7 T. R. 470; *Imlay v. Ellefsen*, 2 East, 453; *Dillon v. Alvares*, 4 Vesey, Jr. 357; *Foster v. Vassal*, 3 Atk. 587; *Bayley v. Edwards*, 3 Swanst. 703; *Howell v. Waldron*, 2 Ch. Ca. 85; 2 Dan. Ch. Pr. 721; Story's Eq. Plea. § 741. The weight of American authority also is decidedly to the same effect. The undeviating rule in this circuit has been that the pendency of another action for the same cause in a State court is not a good plea in abatement. *White v. Whitman*, 1 Cur. 494; *Lyman et al. v. Brown et al.*, 2 Cur. 559; *Wadleigh v. Veasie*, 3 Sumn. 165. The same rule is established in most of the States. *Bowne v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 Johns. 99; *McTilton v. Love*, 13 Ill. 486; *Mitchel v. Bunce*, 2 Paige, Ch. 606. Much consideration was given to the whole subject in the case of *Salmon v.*

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Wotten, 9 Dana, 422, to which reference is specially made, for a clear and full exposition of the reasons on which the rule is founded. Expressions are to be found in some of the cases decided in the Supreme Court, which until carefully examined may seem to favor the opposite rule. Take, for example, the case of *Smith v. McIver*, 9 Wheat. 532, where the opinion was delivered by the chief justice. He says that in all cases of concurrent jurisdiction, the court which first has the possession of the subject-matter must decide it; but that remark was made in a case where all the questions had been decided in a court of law, and the proposition was to have them reviewed on the chancery side of the court.

Another rule is, where there are several authorities equally competent to bind the goods of a party when executed by the proper officer, that they in general shall be considered as effectually bound by the authority which first actually attaches upon them and takes them into custody. Numerous cases have arisen where that principle is involved; and in enforcing it there will be found expressions which, if separated from the facts to which they were applied, would seem to conflict with the present rule. *Hagan v. Lucas*, 10 Pet. 400, is of this class; and so also are *Wallace v. McConnell*, 13 Pet. 151, and *Taylor et al. v. Carryl*, 20 How. 583. The strongest case of the description mentioned is that of *Shelby v. Bacon et al.*, 10 How. 68, in which the opinion was given by Mr. Justice McLean. But the remarks of the learned judge were not necessary to the decision of the case, and clearly cannot be regarded as a judicial determination. The case of *Suydam et al. v. Broadnax*, 14 Pet. 67, also contains an expression which may or may not be construed in the same way. None of these cases, however, decide the question under consideration, and I am of the opinion that the pendency of a suit in the State court cannot be pleaded in bar or abatement to a suit between the same parties in this court. Suppose it were otherwise, however, still the rule would not apply in this cause, because the nature of the proceedings is different, the parties are not the same, and there are questions presented for decision here which are not involved in the suit in the State court. The motion for a continuance is, therefore, denied.

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wards proceeded to examine the merits of the case, and may be come to the conclusion that the bequest was introduced into the decree, dismissing the bill of complaint without further consideration on the same requires," says the learned judge, "that the defendant should be yielded to the court before which the practice of the first instituted." to reply to such

Doubts are entertained as to whether he should obtain a judge in that part of the opinion, §, 797. Strong doubts as affirming that there is an error in any application where the Circuit Court to stay the proceedings in the same jurisdiction, refuse jurisdiction, it will be as of the plea as being clearly a ble for this court to yield. It is previously stated, in the same section of the authorities cited, that the plea of another suit depending is be found where it is in a court of another country, or in Ireland, for the same matter. *Dan. Ch. Pr. 658, 726.* But it is unnecessary, may be a question, as there is no plea of any kind in The decision in the case. The docket entries show that the cause was set down but the case was upon bill, answer, replication, and proofs. The in which the proceedings of the Circuit Courts is chiefly regulated by the printed English rules prescribed by the Supreme Court. A reference to the suit docket of proceedings where pleas are filed is not necessary, same as before stated, there is no plea in the case of any of kind. The process of subpoena cannot issue from the clerk's office in any suit in equity until the bill of complaint is filed at the office. Whenever the bill is filed, the clerk is required to issue the process of subpoena, as of course, upon the application of the complainant, which shall be returnable into the clerk's office the next rule-day or the next rule-day but one, at the option of the complainant. The appearance-day of the respondent is the rule-day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day. The answer, plea, or demurrer must be filed by the respondent, unless the time for it is enlarged, on the rule-day succeeding that of entering his appearance. The former rule, that, if a respondent submits to answer, he shall answer fully to all the matters of the bill, is repealed in cases where he might by plea protect himself from such answer and discovery. But

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cases by answer to insist upon all matters of
 are dilatory, in bar, or to the merits of the
 which he could avail himself by a plea in
 and on any rule-day, the complainant
 pending rule-day to file exceptions
 and no longer; but if no exception
 within that period, the rule is that the
 and taken to be sufficient. Whenever
 may be excepted to, or shall be adjudged suffi-
 complainant shall file the general replication thereto
 the next succeeding rule-day thereafter; and in all
 where the general replication is filed, the cause shall be
 closed, to all intents and purposes at issue, without any rejoinder
 or other pleading on either side. The dismissal of the suit
 follows if the complainant omits or refuses to file such replica-
 tion within the prescribed period. The proceedings in this case
 have been in conformity to those rules, and they are correct.
 No exceptions were taken to the answer of the respondents, and
 consequently, when the prescribed period had elapsed, it became
 the duty of the complainants to file the general replication.
 The motion is denied.

THE UNITED STATES v. ARTHUR W. AUSTIN.

By the act of the 2d of March, 1799, casks, chests, or cases of distilled spirits, wines, and
 teas, when imported, were required to be branded or otherwise marked by the surveyor
 or other officer acting as inspector of the revenue for the port where such merchandise
 was landed.

When thus branded, it was the duty of the surveyor or chief officer of inspection to give a
 certificate to the proprietor, importer, consignee, or agent, of the whole quantity of such
 spirits, etc., also the name of such proprietor, etc., the name of the vessel from which
 such importation was landed, and of the marks of each cask, etc.

The treasury circular of the 18th of July, 1795, allowed to the supervisors of the revenue,
 for preparing, stamping, and distributing among the inspectors, the sum of one cent for
 every certificate to accompany foreign and domestic distilled spirits, wines, or teas,
 which should be actually issued in the ports of their respective districts.

When the revenue act of March 2, 1799, was passed, it became necessary to issue a new

The second branch of the motion is, that the cause may be referred to a master, with directions that he shall look into the two cases and report whether or not they are both upon the same matter and between the same parties. Where the defendant pleads the pendency of another suit, it is said in the practice of the parent country, that the plaintiff ought not to reply to such a plea, even if he disputes the fact, but that he should obtain a reference to a master. 2 Dan. Ch. Pr. 726, 797. Strong doubts are entertained whether that rule ever had any application where the alleged prior suit was not pending in the same jurisdiction, because the learned author speaks of the plea as being clearly a good plea, whereas he had previously stated, in the same section of the same chapter, that the plea of another suit depending is not a good plea in the court of another country, or in Ireland, or in the colonies. 2 Dan. Ch. Pr. 658, 726. But it is unnecessary to decide that question, as there is no plea of any kind in this case. The docket entries show that the cause was set down for hearing upon bill, answer, replication, and proofs. The practice of the Circuit Courts is chiefly regulated by the printed rules prescribed by the Supreme Court. A reference to the course of proceeding where pleas are filed is not necessary, because, as before stated, there is no plea in the case of any kind. The process of subpoena cannot issue from the clerk's office in any suit in equity until the bill of complaint is filed at the office. Whenever the bill is filed, the clerk is required to issue the process of subpoena, as of course, upon the application of the complainant, which shall be returnable into the clerk's office the next rule-day or the next rule-day but one, at the option of the complainant. The appearance-day of the respondent is the rule-day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day. The answer, plea, or demurrer must be filed by the respondent, unless the time for it is enlarged, on the rule-day succeeding that of entering his appearance. The former rule, that, if a respondent submits to answer, he shall answer fully to all the matters of the bill, is repealed in cases where he might by plea protect himself from such answer and discovery. But

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he is entitled in all cases by answer to insist upon all matters of defence, except such as are dilatory, in bar, or to the merits of the bill of complaint, of which he could avail himself by a plea in bar. After an answer is filed on any rule-day, the complainant is allowed until the next succeeding rule-day to file exceptions thereto for insufficiency, and no longer; but if no exception shall be filed thereto within that period, the rule is that the answer shall be deemed and taken to be sufficient. Whenever the answer shall not be excepted to, or shall be adjudged sufficient, the complainant shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes at issue, without any rejoinder or other pleading on either side. The dismissal of the suit follows if the complainant omits or refuses to file such replication within the prescribed period. The proceedings in this case have been in conformity to those rules, and they are correct. No exceptions were taken to the answer of the respondents, and consequently, when the prescribed period had elapsed, it became the duty of the complainants to file the general replication.

The motion is denied.

THE UNITED STATES v. ARTHUR W. AUSTIN.

By the act of the 2d of March, 1799, casks, chests, or cases of distilled spirits, wines, and teas, when imported, were required to be branded or otherwise marked by the surveyor or other officer acting as inspector of the revenue for the port where such merchandise was landed.

When thus branded, it was the duty of the surveyor or chief officer of inspection to give a certificate to the proprietor, importer, consignee, or agent, of the whole quantity of such spirits, etc., also the name of such proprietor, etc., the name of the vessel from which such importation was landed, and of the marks of each cask, etc.

The treasury circular of the 18th of July, 1795, allowed to the supervisors of the revenue, for preparing, stamping, and distributing among the inspectors, the sum of one cent for every certificate to accompany foreign and domestic distilled spirits, wines, or teas, which should be actually issued in the ports of their respective districts.

When the revenue act of March 2, 1799, was passed, it became necessary to issue a new

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circular upon the subject, because the whole duty of providing such blank certificates was therein imposed upon the supervisors of the several districts.

Such supervisors were, by the new circular, allowed one cent for every certificate prepared, stamped, and distributed, and the addition of one cent for numbering and signing every certificate which was actually issued in the ports comprehended within their respective districts.

By the act of the 6th of April, 1802, the duty of preparing and furnishing such certificates was transferred to collectors, and in the same act it was provided that they should receive the same compensation therefor as that before allowed to supervisors.

This duty is one directly connected with the office held by the collector, and he cannot be entitled to a greater amount from that source than the sum of \$400, which is the maximum allowed by law to collectors for extra services having an affinity or connection with the duties of said office.

The act of the 12th of June, 1858, directed that collectors of customs should act as disbursing agents of money appropriated for the erection of marine hospitals, and with such compensation, not exceeding one fourth of one per cent, as the Secretary of the Treasury should deem equitable; but any sums charged by a collector on money disbursed for such purpose before the passage of the act, falls within the prohibition of the act of the 28d of August, 1842, and must be rejected.

Sums charged by a collector as commissions on sums disbursed for the erection of a marine hospital, under the act of the 12th of June, 1858, cannot, when they have not been disallowed by the accounting officers of the treasury, be allowed in set-off against a suit by the United States against such collector for sums alleged to be due from him.

In case of extra services performed by a collector under the directions of the department, beyond the limits of his district, and which have in character no affinity or connection with the duties of his office, he may be allowed compensation therefor, although it exceeds the maximum for extra services of the opposite nature.

ASSUMPSIT to recover of the defendant \$13,996.66, alleged to be due from him as collector of the port of Boston and Charlestown, on the settlement of his accounts with the Treasury Department. The defendant pleaded the general issue, and claimed a set-off. The principal dispute arose upon the several sums pleaded in set-off, which defendant contended should be deducted from the amount demanded by the plaintiffs. The allowance first claimed in set-off was the sum of \$464.78, alleged to be due as compensation for signing spirit certificates under the several acts of Congress upon that subject; the second was for commissions on disbursements made by the defendant as collector, in the construction of the Marine Hospital at Chelsea, in this district, which amounted, deducting the sum allowed by the accounting officers of the treasury, to \$812.50; the third was for commissions on moneys disbursed by the defendant as collector for the

light-house establishment in districts other than the one for which he was appointed.

The case came up on an agreed statement of facts. For the purposes of this suit the defendant admitted the receipt of \$6,400 for every year while he was collector, and at that rate for every fraction of a year during his term of service, which was from April 1, 1857, to March 1, 1860.

If the court should be of opinion that all the charges made by the defendant should be disallowed, a verdict was to be taken for the plaintiffs for the whole amount claimed, with such interest if any, as the court might think proper to allow. If the court should be of opinion that any or all of the charges should be allowed, a verdict was to be taken for the plaintiff for the amount found to be due, according to the principles established by the court.

R. H. Dana, Jr., United States District Attorney, and *T. K. Lothrop*, Assistant.

The act of April, 1802, may be considered as having transferred to collectors the duties of the supervisors of the revenue, so far as concerned the signing of spirit certificates; and these duties may be comprehended under the language of the act of May 7, 1822, as services performed in another office or capacity, for which the collectors may be entitled to not more than \$400 annually.

This seems to have been the construction of this statute by the Treasury Department at the time of its passage.

The facts agreed in this case find that the defendant has received in each year, during the whole term of his office, the full sum of \$6,400, which sum is the amount of the maximum compensation allowed him as collector by the act of March 3, 1841, \$6,000, and of the extra allowance permitted by the act of May, 1822, \$400.

There is no ground for claiming that the defendant is entitled to an allowance for these certificates over and above these two sums.

The case at bar, so far as the defendant's claim for signing spirit certificates is concerned, is briefly thus: the duties per-

formed by the defendant were a part of, or incident to, his official duties as collector; the law has provided a maximum compensation for such services, and the defendant has already received this compensation in full. He cannot, therefore, claim any additional payment on this account.

The defendant's claim for commissions on his disbursements for the construction of the Marine Hospital is precisely one of those which, by the very words of the act, cannot be allowed. It is a claim for compensation for the disbursement of public money.

It is not authorized by law.

There is no appropriation therefor.

The appropriation for the construction of the hospital does not explicitly set forth that it is for such compensation. On the contrary, it makes no provision explicitly, or even by the remotest implication, for such compensation. The act of 1855, providing for the building of the hospital, was the only statute on this subject-matter, and the only act really bearing on this question, except that of August, 1842.

The fact that there was no appropriation to pay a commission on these disbursements distinguishes the case from that of *Converse v. The United States*, 21 How. 463, for in that case there was a specific appropriation to pay the commission claimed by Converse's intestate, and the case was decided upon the ground that it came within the very terms of the statute of August, 1842, and was a compensation authorized by law, and the appropriation for which "explicitly set forth that it was for such compensation." 21 How. 474.

The remainder of the defendant's claim to a set-off is confined to his claim for a commission of two and a half per cent on all disbursements made by him on account of the light-house establishment for purposes outside of, and disconnected with, the district of which he was collector.

This claim may be divided into three classes:—

1st. The amount of \$564.43, not included in the defendant's accounts rendered to the Treasury Department at any time during his continuance in office, or after his retirement therefrom in

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March, 1860, and up to the time of the bringing of this suit, the 14th of January, 1862.

This amount, not having been submitted by the defendant to the accounting officers of the treasury, and by them disallowed, cannot be the subject of a set-off. Act March 3, 1797, c. 20, §§ 14, 15 (1 Stat. at Large, 415).

2d. The defendant's claim for commissions on the amount expended by him for this purpose, during the fiscal year from June 30, 1858, to June 30, 1859, must be disallowed.

The ground on which a similar claim for commissions on similar disbursements was sustained by the Supreme Court in *Converse v. The United States* (*ut supra*), was that the claim was for a compensation authorized by law, and the appropriation explicitly set forth that it was for such compensation. Both these elements must combine to make a valid claim against the government. The act of June 12, 1858 (11 Stat. at Large, 320), which contains all the appropriations for light-house disbursements for that year, makes no provision for the payment of commissions on the disbursements; and as there was no appropriation made for the payment of any commission on the disbursements for this purpose for the fiscal year from July 1, 1858, to July 1, 1859, the defendant's claim to set-off must be diminished by the amount charged for these commissions.

It is claimed that these commissions charged for this fiscal year may be paid from the unexpended surplus of the appropriations. But the statement of facts shows no surplus.

The defendant's remaining claim for commissions on other disbursements for light-house purposes, outside of his own district, should not be allowed.

The case is to be distinguished from that of *Converse v. The United States*.

In that case the plaintiff in error, as administrator of Philip Greely, collector of the port of Boston, claimed an allowance as commissions due him from the United States upon "contracts, purchases, and disbursements made by him for oil and other articles for the light-house service of the United States, under the direction of the Secretary of the Treasury."

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None of the like services for which the Supreme Court decided that Mr. Greely was entitled to compensation were performed by the defendant. He made no contracts, prepared and published no proposals, took charge of none of the purchased property or materials for safe-keeping or distribution. He did nothing involving time, labor, or responsibility. The only service performed by him was paying bills, duly certified to him, out of the moneys in his hands.

In order to bring any case within the reason of the decision of the Supreme Court in the case of *Converse v. The United States*, three requisites are necessary: —

1. The services specified must have been actually performed by the party claiming remuneration.
2. The compensation must be fixed by law.
3. There must be a law making an appropriation, and explicitly setting forth that it is for such additional pay, extra allowance, or compensation.

The like services, for which it was decided that Greely was entitled to remuneration, were not performed by the defendant, and there is not a law setting forth, explicitly, any appropriation for the compensation claimed.

Austin pro se.

On the subject of disallowances it may be remarked that, agreeably to the spirit of the former decisions of the Supreme Court of the United States, what is not allowed by the department must be considered disallowed.

Defendant claims that, agreeably to the decision in *United States v. Converse*, 21 How. 464, he has fulfilled all the requisitions entitling him to the commissions on light-house disbursements.

“The services were foreign to his official duties, and beyond the limits of the district to which the law confined his official duties.”

“The commissions are to be paid on the whole amount, without any reference to the person or office who performs the service.”

Congress has never acted upon the principle that the head of

a department should exercise unlimited power over his appointees or subordinate officers, and require of them services without compensation, not within the legal contemplation of their duties. Here are services rendered outside of the collection district, and it would be conferring upon a Secretary of the Treasury or a Postmaster-General arbitrary powers, if they could require of their respective appointees, without compensation, duties or services, having no reference to their offices, which would make the appointment originally conferred upon them a burden. All the appropriation acts after the establishment of the Light-house Board recognize the same disbursing agents as before, and not only that, but practically they were always appointed by the Secretary of the Treasury after, in the same manner they were before, the existence of the Light-house Board.

The money has been disbursed during the three years of Mr. Austin's collectorship by Mr. Austin, by the same disbursing agent, appointed in the same way and by the same authority as before the creation of the Light-house Board.

That the duties of the disbursing agent were not dependent upon and not qualified by the Light-house Board Act. It must be conceded that the two and a half per cent commissions appropriated since the creation of the Light-house Board were intended for some one; from 1852 to 1861 they amount to over \$63,000, and over \$26,000 during the time Mr. Austin was collector. For whose use was this large sum appropriated, if not for the persons who performed the service?

As collectors were absolutely restricted from receiving anything beyond a small fixed sum in their own districts, of course the large appropriation was intended to supply a sum to compensate for services as disbursing agents out of their own districts, else there was no necessity for any such appropriation.

The claim of two and one half per cent commissions for disbursements on construction of Marine Hospital depends very much on the same principles as that for disbursements outside of the light-house. The claim is for two and one half per cent commissions, to May 31, 1858. The claim after that period, by the statute of June 12, 1858, is limited to one fourth of one per

cent. I cite that statute for a double purpose, to examine its bearing on this as well as on the question of disbursements for light-house purposes outside of the district. The statute is as follows : —

“ And be it further enacted, that the collectors of the customs in the several collection districts be, and they are hereby and hereafter required to act as disbursing agents for the payment of all moneys that are or may hereafter be appropriated for the construction of custom-houses, court-houses, post-offices, and marine hospitals, with such compensation, not exceeding one quarter of one per cent, as the Secretary of the Treasury may deem equitable and just.” 11 Stat. at Large, c. 154, § 17, p. 327.

The collector is undoubtedly entitled to two and a half per cent commissions up to May 31, 1858, agreeably to the decision in *United States v. Converse*, unless the court should think the appropriation was not direct enough. The act for the construction of the Marine Hospital appropriates a sum sufficiently large to build it, but makes no specific appropriations for the benefit of those who perform the necessary incidental services. I refer to ch. 175, page 669, Second Session, 1855.

Sections five and six, in relation to building Marine Hospital. — An appropriation is made to cover the whole expense, but no special specification, two and a half per cent being the usual amount allowed by the government, unless controlled by special legislation, like the act of June 12, 1858, before quoted.

The charge of two and a half per cent was commonly made by collectors up to that time ; the duties were onerous and entirely outside of the duties required of the collector by law.

Another question is also presented, whether the Secretary having continued to employ the collector after June, 12, 1858, the provision of one quarter of one per cent does not relate back (by the terms of the act) to the former service, if the collector is not entitled to the two and a half per cent up to that time.

Still another consideration is presented : this act of June 12, 1858, was passed, and undoubtedly framed at the Treasury Department while the *Converse* case was under discussion, but not a word therein curtailing commissions of light-house disbursing

agents ; from which it may justly be inferred that the whole question arising on that point was to be left to the decision of the court in the Converse case.

Signing Spirit Certificates. — This charge has always been allowed. This charge, as appears by the statement of facts, was presented, and the transcripts do not show its allowance ; it is, therefore, to be considered disallowed.

The authority for the allowance is the act of 1802, sections seven and eight, which are as follows : —

Section 7. Authorizes the Secretary to designate collectors to sign certificates.

Section 8. That for preparing and issuing the certificates, the collectors performing that duty shall be entitled to, and receive, the same compensation as has heretofore been allowed to the supervisors respectively.

This duty was transferred to collectors by circular of June 29, 1802.

This claim is not only supported by an unvaried admission of it at the department, but all the requisitions in the Converse case are fulfilled.

The duty to be performed has no affinity with the collector's duty ; he is directed to perform it, and provision is made for his payment by a specified sum. See 1 Mayo's U. S. Fiscal Department, 80.

The compensation is modified in consequence of increasing duties in numbering and signing the certificates, raising the compensation to two cents for each certificate.

CLIFFORD, J. The maximum compensation of the collector of this port as such is \$6,000 as was decided by the unanimous judgment of the Supreme Court. *United States v. Walker*, 22 How. 299 ; 5 Stat. at Large, 432. The eighteenth section, however, of the act of Congress of the 7th of May, 1822, provides that no collector, etc., shall ever receive more than \$4,000 annually, exclusive of his compensation as collector, and the fines and forfeitures allowed by law, for any service he may perform for the United States in any other office or capacity. 3 Stat. at Large, 696. Collectors, at the time this law was passed, were required,

in certain contingencies, solely to execute all the duties in which, otherwise, the co-operation of the naval officer was requisite, and in case of the disability or death of the naval officer, they were also required to act solely until a new appointment was made. 1 Stat. at Large, 643. The settled practice of the department also was to require them, without any special law upon the subject, to superintend the light-houses in their respective districts, and to disburse money for marine hospitals and the revenue-cutter service. Such services were uniformly charged as extra services, and as such were allowed by the department. The attention of Congress was eventually attracted to the subject, and the result was that the act of the 7th of May, 1822, was passed. The Supreme Court held that by the true construction of that provision it does not forbid compensation for extra services, which have no affinity or connection with the duties of the office held by the collector. On the contrary, the court held that the provision recognizes such a right, and gives to the collector an additional sum, over and above his salary as an officer, for extra services rendered as agent, which had no legal connection with his office. *Converse v. United States*, 21 How. 468. The practice of the department has also uniformly conformed to this rule, as appears by the record in this case. The agreed statement shows that the defendant was appointed, on April 1, 1857, and continued to perform the duties of the office until March 1, 1861; and it also appears that throughout that period he has been allowed and paid \$400 per annum for extra services, in addition to the maximum compensation allowed to the office. The remark, however, should be made that the services for which a compensation has been received are altogether separate and distinct from those charged in set-off, and which are now the subject of dispute. Allusion is made to the subject, not as calling in question the propriety of the allowance, but as showing the settled construction of the provision under which the services were allowed and paid.

The most important objection made to the several claims of the defendant, as exhibited in his set-off, is that every such allowance to a collector for extra services beyond the sum of \$400 is pro-

hibited by law, and as that proposition, if sustained, is a complete answer to the entire claim of set-off, it will be first considered.

Support to the proposition is chiefly derived from, or attempted to be derived from, the second section of the act of August 23, 1842, and kindred provisions to be found in subsequent acts of Congress. 5 Stat. at Large, 510. The prohibition as contained in that provision is that "no officer in any branch of the public service, or any other person whose salary, pay, or emoluments is or are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation in any form whatever for the disbursement of public money, or for any other service or duty whatsoever, unless the same shall be authorized by law, and the appropriation therefor explicitly sets forth that it is for such additional pay, extra allowance, or compensation." The important words of the section, as contradistinguished from prior provisions upon the same subject, are those which follow the word "therefor," near the close of the provision. The question as to the true construction of the provision came directly before the Supreme Court in the case of *Converse v. United States*, 21 How. 471, and the court expressly held that those words only show that the legislature contemplated duties imposed by superior authority upon an officer, as a part of his duty, and which the superior authority had, in the emergency, a right to impose, and the officer was bound to obey, although the duties were extra and additional to what had previously been required. "But," say the court, "those words can by no fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law or usage, with the line of his official duty; and where the service to be performed is of a different character and for a different place, and the amount of the compensation is regulated by law." Circumstances, such as are recited in the opinion of the court, must be regarded as constituting a case to which the provision under consideration does not apply, else the greatest injustice would be done in numerous cases which may be supposed, and which are likely, to arise in the ordinary course of public affairs. Were the rule in such cases

...and finally
...nothing:

MASSACHUSETTS

and finally disallowed, upon nothing; and such is the remaining suggestion is that no such purpose during the fiscal year, 1859, and consequently that no appropriation for the fiscal year preceding; but the June, 1859, and consequently that no appropriation for the fiscal year preceding; but the suggestion is decisive. The un- appropriations of a preceding year may always be applied to the purpose for which they were made in a preceding year, and undoubtedly it was on account of the excess of the appropriations that the suggested omission occurred. A sufficient amount always stood credited on the books of the treasury, and available as a fund for that purpose, to pay the just claims of the defendant. The amount to be computed in conformity to the opinion of the court.

DISTRICT.

NEW HAMPSHIRE DISTRICT.
OCTOBER TERM, 1864.

OCTOBER

THE UNITED STATES v. HENRY F. WENDELL, DANIEL MARCY,
RICHARD JENNESS, THOMAS E. OLIVER; and THE UNITED
STATES v. THE SAME, DANIEL MARCY, THOMAS E. OLIVER,
and ALBERT E. BLAISDELL.

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THE UNITED STATES v. RICHARD JENNESS, DANIEL JENNESS, and ALBERT E. BLAISDELL.

The appointment of navy agents was first authorized by the act of March 3, 1861. By that act the maximum compensation of such officers is fixed at three thousand dollars per annum.

Such maximum compensation is in terms based on the period of one year, to be derived from commissions on disbursements, but cannot exceed three thousand dollars, though the legal rate of commissions on sums actually disbursed, would amount to more than that sum.

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The amount disbursed does not determine the maximum, but only the proportion of the maximum to which the officer is entitled when his commissions do not reach the maximum amount; and the excess of one year cannot aid the deficiency of another.

Annual compensation is the rule of decision, not per quarter nor for any subdivision of a year.

Yearly disbursements, as ascertained by the monthly accounts, furnish the means of computing the yearly compensation of the navy agent, with the limitation that the compensation cannot exceed three thousand dollars.

Time of service and the amount disbursed furnish the data for computing the amount of compensation for any fractional part of a year, because the maximum being based on an entire calendar year, the proportion due the officer, can only be ascertained by calculating the proportion of the year which may have elapsed.

Where an officer of the United States, accountable for public money, refuses to pay into the treasury the sum or balance reported to be due upon the adjustment of his account, under the act of 3d of March, 1797, the accounting officers of the treasury are authorized to add to such sum only the commissions due the officer on such unsettled account. The statute does not contemplate the forfeiture of all commissions paid such officer upon settled accounts during the whole term of his previous service.

DEBT on the official bonds of the defendant as navy agent for the port of Portsmouth, in this district. The declaration in each case was in the usual form as at common law. The bond in the first suit was dated the 25th of August, 1857, and in the second the 24th of May, 1858. The suits were against Wendell as principal, and the others as sureties in said bonds.

The cases were submitted upon facts agreed.

The principal defendant was first appointed navy agent on the 1st of September, 1857, in the recess of the Senate, and he continued to hold the office and to discharge the duties thereof under the appointment, until the 24th of May, 1858, when he was regularly nominated and appointed to the office by and with the advice and consent of the Senate, for the term of four years. Under the last appointment he continued to discharge the duties of the office until the 10th of May, 1861, when he was suspended, and another appointed in his stead. The defendants, among other things, pleaded performance. The replication alleged that the principal defendant while in office received large sums of public money, to wit, \$12,073.77, and that he had neglected and refused to pay the same into the treasury of the United States. In the rejoinder the defendants alleged that the principal obligor had fully accounted for all sums received by him, and that he had paid over the whole amount, and tendered an issue, which was duly joined by the plaintiffs.

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districts. The duty of preparing and furnishing such certificates was, by the seventh section of the act of April 6, 1802, transferred to collectors; and by the eighth section of the act, it is provided that they shall receive the same compensation as heretofore has been allowed to the supervisors. 2 Stat. at Large, 150. Accordingly the Secretary of the Treasury, Mr. Gallatin, on June 11 of the same year, issued a circular designating the collector of the customs for this port as the proper officer, under that authority, to furnish such certificates. Granting that the duty is an extra one, still it is a duty directly connected with the office held by the collector, and in no view of the case can the defendant be entitled to any greater amount from that source of income than the sum of \$400 which he has already received.

An examination will next be made of the claim of the defendant for two and a half per cent commissions on all sums disbursed by him in the construction of the Marine Hospital at Chelsea, in this Commonwealth. The authority was conferred upon the Secretary of the Treasury by the fifth section of the act of March 3, 1855, to erect such Marine Hospital, for the construction of which the disbursements in this case were made. The sale of the land and buildings previously occupied as a marine hospital was authorized to be made, and a sum of money was appropriated for the construction of the new hospital, equal to the proceeds of such sale; but the act of Congress contains no provision fixing the compensation of any disbursing agent, and makes no appropriation for any such purpose. 10 Stat. at Large, 669. The subsequent act of June 12, 1858, directs in substance and effect that the collectors of the customs shall act as the disbursing agents of money appropriated for the construction of marine hospitals, and with such compensation, not exceeding one fourth of one per cent, as the Secretary of the Treasury shall deem equitable and just. 11 Stat. at Large, 327. The record shows that \$812.55 of the claim of the defendant accrued before the passage of the last-named act, authorizing the Secretary of the Treasury to allow such a compensation. Obviously, all that portion of the claim must be rejected as falling directly within the prohibition of the act of August 23, 1842, as expounded by

the Supreme Court. *Converse v. United States*, 21 How. 473. The defendant is clearly entitled to such compensation as the act of June 12, 1858, allows to collectors, as disbursing agents of money for the construction of marine hospitals, but nothing can be allowed in this suit on that account, because the sum claimed has never been disallowed by the accounting officers of the treasury. 1 Stat. at Large, 575. The result is that no part of this claim can be allowed as a set-off against the demand of the plaintiffs.

Disbursements were also made by the defendant while he held the office of collector, for the light-house establishment, and for purposes outside of the district to which he was appointed, and having no affinity or connection with the duties of the office which he held. The sum thus claimed is \$9,279, but the agreed statement shows that \$564.43 of that sum had not been presented to the Treasury Department when the suit was brought, and there is no evidence that it has ever been disallowed. The allowance of that sum cannot be made, as there is no evidence to bring the case within any of the exceptions in the act of Congress. 1 Stat. at Large, 515.

The residue of the claim, amounting to the sum of \$8,714.57, was duly presented to the department and was disallowed, as appears by the agreed statement. The services are admitted, and the case, as stated by the parties, falls directly within the rule established by the decision of the Supreme Court. *Converse v. United States*, 21 How. 473. The attempt is made to distinguish the case from the operation of the rule there laid down, chiefly upon two grounds. The suggestion in the first place is made that, some parts of the services performed by the collector in that case were not performed by the defendant; but the agreed statement shows, as the bill of exceptions showed in the case decided in the Supreme Court, that the sum claimed is two and a half per cent commission upon the disbursement made by the defendant within the period mentioned for light-house purposes, outside of his collection duties, and no evidence is introduced or offered to show that the commission charged is not the proper one, if the defendant is entitled to anything. The respective claims of the defend-

United States v. Wendell *et als.*

ant were resisted at the department and finally disallowed, upon the ground that he was entitled to nothing; and such is the theory of the plaintiffs here, as is obvious from a careful reading of the agreed statement. The remaining suggestion is that no appropriation was made for any such purpose during the fiscal year ending the 30th of June, 1859, and consequently that no allowance can be made for the fiscal year preceding; but the answer of the defendant to this suggestion is decisive. The unexpended balances of appropriations of a preceding year may always be applied to the purpose for which they were made in a succeeding year, and undoubtedly it was on account of the excess of the appropriations that the suggested omission occurred. A sufficient amount always stood credited on the books of the treasury, and available as a fund for that purpose, to pay the just claims of the defendant.

Judgment for plaintiffs. The amount to be computed in conformity to the opinion of the court.

NEW HAMPSHIRE DISTRICT.

OCTOBER TERM, 1864.

THE UNITED STATES v. HENRY F. WENDELL, DANIEL MARCY, RICHARD JENNESS, THOMAS E. OLIVER; and THE UNITED STATES v. THE SAME, DANIEL MARCY, THOMAS E. OLIVER, and ALBERT E. BLAISDELL.

The appointment of navy agents was first authorized by the act of March 3, 1861. By that act the maximum compensation of such officers is fixed at three thousand dollars per annum.

Such maximum compensation is in terms based on the period of one year, to be derived from commissions on disbursements, but cannot exceed three thousand dollars, even though the legal rate of commissions on sums actually disbursed, would amount to more than that sum.

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The amount disbursed does not determine the maximum, but only the proportion of the maximum to which the officer is entitled when his commissions do not reach the maximum amount; and the excess of one year cannot aid the deficiency of another.

Annual compensation is the rule of decision, not per quarter nor for any subdivision of a year.

Yearly disbursements, as ascertained by the monthly accounts, furnish the means of computing the yearly compensation of the navy agent, with the limitation that the compensation cannot exceed three thousand dollars.

Time of service and the amount disbursed furnish the data for computing the amount of compensation for any fractional part of a year, because the maximum being based on an entire calendar year, the proportion due the officer, can only be ascertained by calculating the proportion of the year which may have elapsed.

Where an officer of the United States, accountable for public money, refuses to pay into the treasury the sum or balance reported to be due upon the adjustment of his account, under the act of 3d of March, 1797, the accounting officers of the treasury are authorized to add to such sum only the commissions due the officer on such unsettled account. The statute does not contemplate the forfeiture of all commissions paid such officer upon settled accounts during the whole term of his previous service.

DEBT on the official bonds of the defendant as navy agent for the port of Portsmouth, in this district. The declaration in each case was in the usual form as at common law. The bond in the first suit was dated the 25th of August, 1857, and in the second the 24th of May, 1858. The suits were against Wendell as principal, and the others as sureties in said bonds.

The cases were submitted upon facts agreed.

The principal defendant was first appointed navy agent on the 1st of September, 1857, in the recess of the Senate, and he continued to hold the office and to discharge the duties thereof under the appointment, until the 24th of May, 1858, when he was regularly nominated and appointed to the office by and with the advice and consent of the Senate, for the term of four years. Under the last appointment he continued to discharge the duties of the office until the 10th of May, 1861, when he was suspended, and another appointed in his stead. The defendants, among other things, pleaded performance. The replication alleged that the principal defendant while in office received large sums of public money, to wit, \$12,073.77, and that he had neglected and refused to pay the same into the treasury of the United States. In the rejoinder the defendants alleged that the principal obligor had fully accounted for all sums received by him, and that he had paid over the whole amount, and tendered an issue, which was duly joined by the plaintiffs.

The chief question presented for decision was whether the principal defendant had retained larger sums than he was entitled to receive as compensation during the period he held the office of navy agent. He charged as commissions for the month of September, 1857, the sum of \$351.91; but the department holding that his maximum compensation was only at the rate of \$3,000 per annum, refused to allow more than \$250 for that month. The balance of the account was accordingly disallowed, and he was directed to debit himself with the difference in his next account, and the agreed statement showed that he complied with the direction. The agreed statement also showed that his disbursements constantly exceeded \$2,000 per quarter, so that under the rule adopted by the department he was entitled to the admitted maximum rate of compensation. Conforming to that rule, the incumbent subsequently, as it appeared, stated his accounts with the department at the end of each quarter of the calendar year, claiming \$750 for the quarter until the first quarter of the year 1861; and the accounts as rendered and settled showed that he was allowed that sum quarter yearly as compensation up to that time. When he rendered his account for the first quarter of the year 1861, he presented a claim for \$2,000 as commissions, instead of \$750, as previously charged, but the department rejected the excess and allowed only the last-mentioned amount. From the 1st of April, 1861, to the 10th of May, same year, when the defendant was suspended from office, he disbursed the sum of \$6,320.81, for which he charged nothing in his account rendered to the department. The accounting officers of the treasury, however, allowed him therefor, in the adjustment of his accounts, two per cent, amounting to \$126.46, as commissions. The amounts so allowed, to wit, \$750 and \$126.40, were deducted from the \$2,000, as charged in his account, and the balance was disallowed. The adjustment as made left the defendant the debtor of the United States to the amount of \$1,123.60, and at the close of his term of service the accounting officers of the treasury reported that sum as due from him to the United States. Pursuant to that adjustment, the fourth auditor of the treasury, on the 13th of August, 1861, notified the

defendant of the amount so found to be due. This notice was substantially repeated on the 16th of April, 1862, and on both occasions he was directed to pay the amount into the treasury as part and parcel of the public money. Neither of the demands having been complied with, the department added interest to the sum reported to be due, amounting to \$73.77. The primary claim of the plaintiffs was for those two sums, amounting in the aggregate to \$1,197.37, at the time when the adjustment was made. The commissions allowed and actually paid the defendant while he was in office amounted to \$10,876.40, exclusive of the sum which was disallowed in his last account rendered to the department. Payment of the sum reported as due having been refused by the defendant, the accounting officers of the treasury recharged to him the whole amount of the commissions received by him while he was in office, and the plaintiffs claimed to recover that amount, in addition to the sum and interest thereon reported to be due in the adjustment of the last account.

On the other hand, it was claimed that the principal defendant was entitled to retain the whole sum reported to be due, in addition to what he had previously received, and it was denied that the plaintiffs had any pretence of right to recharge him with the commissions which had been properly adjusted, allowed, and paid by the authorized agents of the government.

C. W. Rand, United States District Attorney.

The statute of March 3, 1855, 10 Stat. at Large, 676, virtually makes the office of navy agent a salaried one, and a *pro rata* allowance for the portion of the year he holds the office is all that he can legally claim. *Hoyt v. The United States*, 10 How. 109.

It is so with collectors and officers of the customs. 9 Stat. at Large, § 1, p. 3.

The language of the statute is plain. Navy agents receive a certain per cent commission on the amount disbursed until compensation reaches \$3,000 per annum, not until it reaches \$2,000 for six months, or \$3,000 for eight months and ten days, as defendants claim, but clearly only until the amount retained gives the officer a compensation at the rate of \$3,000 a year. *United States v. Dickson*, 15 Pet. 141, and *United States v. Pearce*, 2

Sumn. 575, are founded on statutes different in their language and scope from the one under consideration.

The case in second Sumner bears more directly upon the case now at bar, and by the statute of May 7, 1822, 3 Stat. 693, 694, upon which that case was based, Congress evidently did not contemplate the construction put upon it by the court, whether its language warranted that construction or not, for they corrected that construction and virtually reversed the decision of the court by the statute of February 11, 1846, 9 Stat. § 1, p. 3.

The acquiescence of Mr. Wendell in the mode of accounting adopted by the Treasury Department, which is actually required by the statute of February 11, 1846, in the case of collectors and other officers of the customs, is an implied admission against him, and against the position he now assumes. 1 Greenl. Ev. § 197; *Allen v. McKeen*, 1 Sumn. 278, 313, 314; *Peele v. Merchants' Ins. Co.*, 3 Mas. 81.

J. S. H. Frink, for defendants.

The act of March 3, 1855, graduates the compensation of these officers to the amount of labor performed and the responsibilities incurred by them. The only limitation is, that they shall not receive more than a fixed sum "per annum" (during the year), as we translate it. Until their commissions reach the sum of \$3,000, they are entitled to calculate them at the rate prescribed by law, and to retain them for their own use, so far as their disbursements will justify it. They have performed the labor and incurred the responsibility for which Congress intended to compensate them at a determined rate; and the reward becomes theirs as soon as thus earned. It is the quantity of the service, and not its period which the law contemplates, subject only to the limitation suggested. *United States v. Dickson*, 15 Pet. 165; *United States v. Pearce et al.*, 2 Sumn. 575; *United States v. Edwards*, 1 M'Lean, 467; *United States v. McCarty*, 1 M'Lean, 306.

On estimating the amount of commissions, to be allowed navy agents "per annum," the better rule seems to be that they are to be calculated by the official, and not the fiscal or calendar year.

Now in applying these well-considered opinions of the court to the case at bar, we submit, that Mr. Wendell has held twice the office of navy agent, between the 1st of September, 1857, and the 10th of May, 1861, under entirely distinct appointments.

His first commission, under the Presidential appointment, during the recess of the Senate, continued until the next session of the Senate; his subsequent nomination to the Senate, and appointment with their assent and confirmation, continued until he was superseded in 1861. See *McAffie v. Russell*, 29 Miss. 84; *United States v. LeBaron*, 19 How. 74; *Mullikin v. State*, 7 Blackf. 77.

We submit, then, that Mr. Wendell is entitled to compute his commissions for any period of a year, according to the amount of his disbursements; that these commissions become his, as soon as the disbursements are made; that the established method of computing his disbursements is for the official year; that he is to estimate his disbursements for two terms of office; that his disbursements have been sufficiently large to cover the sum now sought to be recovered, as part of his commissions, in addition to that already received; and that he has not waived any right, thus to compute his commissions.

If, however, we concede the position of the plaintiffs, that these disbursements are to be reckoned by the calendar or fiscal year, but still adhere to the decided cases, that Mr. Wendell's compensation is to be determined up to a certain sum, solely by the amount of his disbursements, and not by the time occupied in making them, then the computation is more favorable to us.

The plaintiffs further claim that if any sum is found due by the court from defendant, it works a forfeiture of his previously acquired commissions during the entire term of his service. 1 Stat. at Large, p. 512, § 1.

To this the following suggestions are made: —

It is a penal act, and should be construed strictly. The construction now sought to be put upon it would not effect the intentions of its authors. It was intended as a penalty for wilful

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detention of a balance due, and not as a check to a judicial determination of the rights of receivers of public moneys; otherwise it would prevent judicial inquiry, in all cases raising a doubt as to the right to retain a sum reported to be due, because the risk of forfeiture would be so disproportionate to the claim that a public officer could ill afford to litigate his rights.

The whole object of a penal statute is to punish some wrongful act, wilfully committed.

And in another view, the construction given this act by the plaintiffs would work great injustice.

Suppose a large balance to be reported as due from an officer to the United States by the auditor of a department. The officer, believing that he is authorized in so doing, retains it after demand, and it is litigated. It is adjudged that the greater portion of the sum has been lawfully retained, but judgment is recovered by the United States against such officer for a small sum in excess of the sum he had the right to withhold. If the theory of the plaintiffs is true, he has forfeited by his partially successful attempt to establish his right, the whole of his commissions for the service of years. Under the rule governing the construction of penal statutes, it ought not to receive so unjust an interpretation as this.

And if the court should be of the opinion that there can be any forfeiture under the circumstances of the case at bar, we pray its consideration as to whether there can be any forfeiture unless the full balance reported to be due is recovered by the plaintiffs; because if a partial recovery is had, the right and wrong of the matter is equally balanced. Both parties are right and both wrong. The defendant could not have paid over the entire sum reported to be due, without relinquishing a portion of his salary beyond all recovery.

We respectfully invite the court to consider whether the commissions referred to in the statute, do not mean the commissions upon the sum retained only.

Such a rule would be more consistent with the equities between the parties than the one sought to be established by the plaintiffs, and the language of the law would seem to justify it.

The language of the act is substantially that the commissions and interest shall be forfeited. It is not contended that the interest is upon any other sum than the one detained; and in fact any other view of it would be nonsensical. The commissions forfeited are to be upon the same sum as the interest, and we submit that the forfeiture of both commissions and interest is limited to those accruing on the sum detained.

CLIFFORD, J. This controversy has arisen from a difference of opinion as to what was the measure of compensation to which the principal defendant was entitled. The condition of the respective bonds is that the incumbent in the office shall faithfully discharge all his duties as navy agent for the port where he was appointed. A doubt cannot be entertained that the officer, under that condition, was obliged to account for and pay over all public money which came to his hands, except what he was entitled to retain as compensation for his services. The question presented, therefore, cannot be satisfactorily solved, without first ascertaining what sum the incumbent was lawfully entitled to retain as compensation.

Navy agents were first authorized to be appointed by the third section of the act of the 3d of March, 1809; and the same section provides that their compensation shall not in any instance exceed that allowed to the purveyor of public supplies. 2 Stat. at Large, 536; *Browne v. United States*, 1 Cur. 18. They are described in the section authorizing their appointment, not in terms as navy agents, but as agents appointed either for the purpose of making contracts, or for the purchase of supplies, or for the disbursement, in any other manner, of moneys for the use of the navy of the United States. *United States v. Cutter et al.*, 2 Cur. 626. Such agents receive and disburse large sums of money, and they are required by law to make monthly returns, in such form as may be prescribed by the Treasury Department, of the moneys received and expended during the preceding month, and of the unexpended balance in their hands. 2 Stat. at Large, 536. Their term of office is for four years, removable at pleasure; and such appointments are required to be submitted to the Senate for confirmation. 3 Stat. at Large, 582; 5

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Stat. at Large, 703. The provision for their compensation as originally enacted, remained unchanged until the 3d of March, 1855, when the act was passed which gives rise to the present controversy. 10 Stat. at Large, 676. An express provision is made by that act, that in lieu of \$2,000 per annum, the maximum compensation now allowed by law to navy agents, there shall be allowed two per centum commission on the first \$100,000, or under, disbursed by them, and one per centum on every succeeding \$100,000 disbursed by them, until the compensation reaches \$3,000 per annum, which amount shall be the maximum compensation for such agents. Certain provisos are also annexed to the section, which it is not important to notice at the present time. Statutory regulations can hardly be clearer or more explicit than is the language of the section upon the subject under consideration. The compensation of the officers named cannot exceed the sum of \$3,000 for the services of one year. Attention to the language employed will show, that the maximum is in terms based on the period of one year, and is a point of fact upon nothing else, because, let the amount be ever so great, the compensation of the officer cannot exceed the yearly sum of \$3,000. The amount disbursed does not determine the maximum, but only the proportion of the maximum to which the officer is entitled, as is evident from the fact that the excess of one year cannot aid the deficiency of another. The maximum compensation is fixed by law at \$3,000 per annum, and the reference undoubtedly is to the calendar year, as is obvious from the fact that the allowance of the per centum, that is, the one per centum or two per centum, as the case may be, is continued until the compensation reaches the sum of \$3,000. The compensation per annum, therefore, is the rule of decision, and not per quarter, nor for any other legal subdivision of the year. Yearly disbursements, as ascertained by the monthly accounts, furnish the means of computing the yearly compensation of the officer, and of determining what proportion of the maximum he is entitled to receive for that period of time, subject to two important limitations prescribed by law; that is to say, that the compensation cannot exceed \$3,000, and, that the act prescribing the max-

imum shall not be so construed as to reduce the salary to which any navy agent was entitled under previous laws.

The time of service and the amount disbursed, are the data for computing the amount of the compensation for any fractional portion of the year, because the maximum being based on an entire calendar year, the proportion of it due to the officer, if earned, can only be determined by ascertaining the proportion of the year which has elapsed. Where officers of the United States, entitled to a yearly compensation are superseded within the year, the general rule is that they are entitled to a *pro rata* compensation. Reference is made by the defendants to the case of *United States v. Dickson*, 15 Pet. 141, where a different rule was applied, but in the judgment of this court, the rule there prescribed is not applicable in this case. *Hoyt v. United States*, 10 How. 143. The contrary rule is the correct one in the settlement of accounts with collectors and all other revenue officers, and with ambassadors and ministers plenipotentiary, and perhaps, at the present day, with all other persons holding office under the Federal government. 9 Stat. at Large, 3; 11 Stat. at Large, 52. The act of the 11th of February, 1846, provides that collectors and all other officers of the customs, serving for a less period than one year, shall not be paid for the entire year, but shall be allowed in no case more than a *pro rata* of the maximum compensation of said officers respectively, for the time only which they actually serve as such collectors or other officers, whether the same be under one or more appointments, or before or after confirmation. A special reference is also made by the defendants to the case of *United States v. Pearce et al.*, 2 Sumn. 575; but it is a sufficient answer to that case, to say that the act of Congress first referred to, passed since the date of that decision, establishes a different rule.

The conclusion, therefore, upon this branch of the case, is that the accounts of the principal defendant, so far as respects the balance of \$ 1,123.60, reported to be due, and which on the 30th of August, 1861, he was directed to deposit to the credit of the treasury, were correctly adjusted by the accounting officers of the department, and that the plaintiffs are entitled to recover for

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that amount, together with interest on the same from the date of settlement.

The second proposition of the plaintiffs is that the principal defendant having refused to deposit the balance reported to be due, as directed by the proper officer of the department, they, the plaintiffs, were authorized to recharge the whole amount of the commissions previously allowed to him during the whole period of his service in that office. The claim is based upon the first section of the act of the 3d of March, 1797, which in effect provides that when a person accountable for public money shall neglect or refuse to pay into the treasury the sum or balance reported to be due, upon the adjustment of his account, it shall be the duty of the comptroller to institute suit for the recovery of the same, adding to the sum stated to be due, the commissions of the delinquent; and the act declares that the same shall be forfeited in every instance where suit is commenced and judgment is obtained thereon. 1 Stat. at Large, 512. But the proposition cannot be sustained, because the whole amount recharged had been lawfully and conclusively adjusted and allowed to the defendant. The "commissions of the delinquent" are only such as are pending, and are not such as have been paid to the officer, under a final adjustment of his accounts. Where suit is commenced under the circumstances described in the provision, all unsettled and pending commissions are to be adjudged forfeited in case judgment is obtained in favor of the United States. Addition may be made to the sum reported to be due of the unsettled commissions in the hands of the delinquent, but it is not the purpose of the act to reopen accounts fairly and conclusively adjusted and settled. Instances may be found where the same person has held a particular office for forty years, and if the proposition be correct, a dispute in the settlement of his account for the last quarter of the fortieth year would open the accounts for the entire period he held the office. Such a construction of the act of Congress cannot be adopted, and the proposition is accordingly overruled. Referring to the agreed statement, it will be seen that the whole amount reported to be due from the principal defendant accrued under the bond declared on in the second

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suit. The plaintiffs are entitled to judgment in the second suit, but in the first suit judgment must be entered for the defendants.

Costs are allowed in the second suit but the United States are never liable to costs.

RHODE ISLAND DISTRICT.

NOVEMBER TERM, 1864.

CHARLES GOODYEAR, Executor of the last Will and Testament of CHARLES GOODYEAR, deceased, THE UNION RUBBER COMPANY, and THE PHOENIX RUBBER COMPANY, *v.* THE PROVIDENCE RUBBER COMPANY, AUGUSTUS O. BOURN, WILLIAM W. BROWN, and EDWIN M. CHAFFEE.

The general rule is, that an interlocutory order for issues to a jury in an equity suit will not be directed until the proofs are taken and publication has passed.

It is not indispensably necessary, as a matter of law, in any case, that any question in an equity suit in a Federal court should be sent to a jury.

When feigned issues are directed by the court sitting in equity, it is generally done upon the ground that the evidence in the record is not of a character, or not sufficient to afford the means of a satisfactory conclusion; but the verdict of the jury is only advisory, and may be set aside or even overruled.

State regulations to the extent that they define the rules of property are regarded as furnishing the rule of decision, but they do not control or affect the process or practice of the Federal courts.

The equity practice of the Federal courts, when not controlled by an act of Congress or the rules prescribed by the Supreme Court, is in general regulated by the chancery practice of the parent country as it existed prior to the adoption of what are called the "New Rules."

In this case the bill of complaint was not founded on the title of the original patentee, but on the derivative title of the first-named complainant, to whom, as executor of the patentee deceased, the patent was reissued; therefore, objection to the right of the complainants to maintain their bill, because only one of the persons named as executors in the last will and testament of the original patentee was made party to the bill, cannot be sustained.

The reissued patent, under these circumstances, is a new contract between the government and the executor, since the decease of the original patentee.

Where other persons named as executors did not join with the complainant in proving the

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will of an original patentee, or in the surrender or reissue of the original patent, they need not be made parties to a bill of complaint for the infringement of the said reissued patent.

The objection to the maintenance of a bill in equity founded on letters-patent, that the specification did not set forth the invention in such full, clear, and exact terms as would enable any person skilled in the art to practise the invention, is not open to the defendants when no such defence is set up in their answer, and the record shows that application was made to the court to amend in that particular.

Under the fifth section of the act of March 3, 1837, when a patent is properly returned for correction and reissue, the Patent Office is authorized to reissue the original in several parts, if the patentee desires it, and pays the additional sum or sums required by law.

A new product or article of manufacture, and the process by which the same is produced, may be the proper subjects of separate patents.

An inventor claimed "curing caoutchouc or india-rubber, by subjecting it to a high degree of artificial heat"; also "curing the compound of india-rubber, sulphur, and a carbonate or other salt or oxide of lead, by subjecting the same to the action of artificial heat"; but in the descriptive part of the specification declined to limit himself to the exact compound last named, and set out others. A reissue of the patent claimed "a combination of india-rubber with sulphur, with or without other ingredients, chemically altered by the application of heat." It was *held*, that the latter claim, when construed in the light of the description, was not invalid by reason of embracing more than the former.

The reissued patent having been issued in two parts, one claiming a process and the other the product thereof, the claim for the process, when construed in view of both the earlier and later specifications, was *held* not to be broader than the corresponding claim in the original, in so far as it claimed mixing with the rubber other ingredients than sulphur; but the second claim of the reissue was held void, because it included not only india-rubber when compounded with sulphur and subjected to artificial heat, but other vulcanizable gums, — no other gums having been described in the original patent nor in the one to which the claim was appended.

The commissioner of patents has full power to examine and decide upon an application for reissue; and as there is no provision made for an appeal, the decision must in general be regarded as conclusive in all collateral proceedings.

In a proceeding between the government and a patentee to set the patent aside, or in an application for an extension, proof of fraud is conclusive, but it must be clear and satisfactory.

In this case, proof that the extension was obtained by fraud, was held insufficient; but if it had been full, it would not have availed the respondents, because they were shown to have consented to the acts complained of.

After the originality of Charles Goodyear's invention has been repeatedly affirmed by the Circuit Courts of the United States, and there has been no effort made to call the decisions in question, under the circumstances of this case, those decisions were followed by this court.

Construction of the license under which the defendants claimed to manufacture the articles covered by the complainants' patents.

BILL in equity to recover damages for an alleged infringement of certain letters-patent, and praying for an account and for an injunction. The complainants were Charles Goodyear, executor of the last will and testament of Charles Goodyear deceased, the

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Union Rubber Company, a corporation created by the laws of the State of New York, and the Phoenix Rubber Company, a corporation created by the laws of the State of Connecticut. The respondents were the Providence Rubber Company, a corporation created by the laws of Rhode Island, Augustus O. Bourn, William W. Brown, and Edwin M. Chaffee, who were also citizens of the last-named State.

The patents set up in the bill of complaint were, the original patent to Charles Goodyear, deceased, of the 15th of June, 1844, and the patent for the same invention, reissued to the original patentee, of the 25th of December, 1849, which was further duly extended by the commissioner of patents on the 15th of June, 1858, for the additional term of seven years from the time of such extension. The bill of complaint also alleged, that the original inventor died on the 1st of July, 1860, and that the extended patent was duly surrendered and reissued to Charles Goodyear, executor, on the 20th of November, in the same year.

The complainants claimed to be the sole and exclusive licensees of the original patentee, for the manufacture and sale of certain goods particularly enumerated in the bill of complaint; and their title to the exclusive right so claimed was alleged to be derived from three licenses exhibited in the record, which were duly executed by the original patentee during his lifetime. The licenses referred to were, first, the license granted to the Naugatuck India-Rubber Company, under date of July, 1844, which, as the complainants contended, was an exclusive license, conferring the right to manufacture everything (save the articles therein excepted) that could be made out of india-rubber. Secondly, the license to Jonathan Trotter, dated the 5th of February, 1847, which was for the manufacture of wearing apparel of every name and description for men and boys, excepting boots and shoes, bathing-caps, gloves, and mittens. Thirdly, a license to the firm of William Rider and Brothers, on the 1st of July, 1848, which was for the manufacture of army and navy equipments, and various other articles therein specified.

The record contained stipulations which admitted the granting of the several patents set up in the bill of complaint, and the

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execution and assignment of all the licenses under which the corporation complainants claimed the exclusive right to manufacture and sell rubber goods.

The answer was filed on the 1st of December, 1862, denying that Charles Goodyear deceased was the original and first inventor of the improvements described in the original patent; and also denying that the respondents had been guilty of any infringement, as alleged in the bill of complaint. Special defences were also set up in the answer, and, before the proofs were all taken, the respondents appeared and moved the court to pass an order for feigned issues or issues of fact to be tried by a jury.

The parties were heard upon the motion at the time it was presented, and the court refused to pass the order, but postponed the motion to be further heard with the merits. The refusal to grant the motion was placed upon the ground that, under the circumstances of this case, it was premature.

The defendants claimed to manufacture under a license to Edwin M. Chaffee, of date June 25, 1846, which was expressed to be "a free license to use the said Goodyear's gum-elastic composition for coating cloths, for the purpose of japanning, marbling, and variegate japanning, together with all the rights to make and dispose of the aforesaid japanned and marbled or variegated cloths, in and so far as the said Charles Goodyear has obtained any rights, patents, or privileges, and in virtue of all his inventions, patents, and improvements made in the manufacture of india-rubber or gum-elastic goods, and which shall be made hereafter by the said Charles Goodyear.

"And in virtue of all letters-patent, or patent rights of the United States of America, granted to and belonging to, and which shall be granted to and belonging to the said Charles Goodyear, for any and all inventions and improvements in the manufacture of india-rubber goods."

It was insisted by the complainants that the license of the defendants was intended to be restricted to the manufacture of boots and shoes, and that the license granted to certain of the complainants (before referred to) was exclusive in the grant of the right to make army and navy equipments, ponchos, blankets.

bulbs for syringes, and certain other enumerated articles. The other points in dispute, as to the effect and construction of the licenses held by both parties, may be understood from the discussions of counsel and the opinion of the court.

B. R. Curtis, C. S. Bradley, Wingate Hayes, and J. Hervey Ackerman, counsel for complainants.

The Union India-Rubber Company and the Phoenix Rubber Company, being licensees under Goodyear's patent, have the right to join the name of his representative in a suit brought to protect their rights as licensees. *Goodyear v. McBurney*, Law's Digest, § 23, p. 112; *Goodyear v. Bishop*, Law's Digest, §§ 26, 28, p. 113.

The question whether Charles Goodyear, Jr., is executor or not, can only be raised by a plea in abatement. *Childress v. Emory*, 8 Wheat. 642; *Kane v. Paul*, 14 Pet. 33.

The reissue of letters-patent to an executor, by the commissioner of patents, is conclusive that such executor has been duly appointed. *Woodworth v. Hall*, 1 W. & M. 254.

If the licenses of the complainants are exclusive, their right to stop the defendants is complete.

Whether this patent was fraudulently extended or not cannot be inquired into in this suit. That is a question exclusively between the sovereignty granting the extension and the patentee. *Field v. Seabury*, 19 How. 324, 332; *Gibson v. Gifford*, 1 Blatch. 531, 553.

Letters-patent are matter of record, and the general rule is that they can only be avoided in chancery, by a writ of *scire facias* sued out on the part of the government or by some individual prosecuting in its name. This is the settled English course sanctioned by numerous precedents, and there is no statute or precedent in this country establishing a different course. *Jackson v. Lawton*, 10 Johns. 24.

And this is true, though it were issued by mistake, or obtained by fraud or misrepresentation. *People v. Mauran*, 5 Denio, 389, 398.

Though these citations are made from cases respecting patents for lands, it is submitted the same principles must apply and govern the case of an invention or discovery; because in both

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cases the patent is a grant made by the government or sovereignty to some person or persons of some privilege, property, or authority.

Both are issued in the name of the United States by like authority and in the same manner.

The decision of the commissioner of patents in granting an extension is conclusive; such was the intention of the act allowing him to extend a patent. *Colt v. Young*, 2 Blatch. 471, 474.

As the commissioner's decision was made by a special tribunal, with full powers to examine and decide, and as there is no provision for an appeal to any other jurisdiction, the decision is final within the law. *Foley v. Harrison*, 15 How. 433, 448; Patent Laws of 1836, c. 357, § 18; *Philadelphia and Trenton Railroad Co. v. Stimpson*, 14 Pet. 458, 459.

The action of the commissioner of patents in reissuing a patent, which is strictly an *ex parte* proceeding, is not inquirable into, unless a clear case of fraud is made out.

Much less is it, then, in the case of an extension which in its very nature is a judicial proceeding, providing for public notice (of sixty days) to be given, in the section of country most interested adversely to the extension of the application, that any person may appear and show cause why the extension should not be granted, the taking of testimony, a hearing of applicant and contestant before the commissioner, and a decision on the evidence. Patent Act of 1836, § 18; *Day v. Goodyear*, Law's Digest, § 6, p. 617; *Battin v. Taggart*, 17 How. 84; *Woodworth v. Stone*, 3 Story, 753; approved in *Brooks v. Fiske*, 15 How. 228; *Brooks v. Bicknell*, 3 McLean, 258, 435; *Field v. Seabury*, 19 How. 332.

If there was any fraud, defendants knew of it. *Saratoga and Schenectady Railroad v. Row*, 24 Wend. 74.

They have confirmed and ratified the fraud by accepting and working under a license granted after the extension. *Edmunds v. Hildreth*, 16 Ill. 216; *Bronson v. Wiman*, 10 Barb. 406.

They stipulated not to oppose the extension.

There is no proof of damage to them in consequence of the fraud. Fraud and damage must be coupled to entitle a party

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to relief. *Clark v. White*, 12 Pet. 196; *Jackson v. Eaton*, 20 Johns. 478; Story's Eq. Juris. § 203.

Defendants were willing the extension should be obtained, and *volenti non fit injuria*.

The evidence of fraud must be strong and cogent. *Clark v. White*, 12 Pet. 196; *Henry v. Henry*, 8 Barb. 588, 592. See *Philadelphia and Trenton Railroad v. Stimpson*, 14 Pet. 458.

It is a favorite principle governing the action of every court, and especially that of a court of equity, that where an act is susceptible of two constructions, one of which will destroy and the other sustain it, the latter is always to be preferred. This simply supposes legality, rather than illegality. Hence the maxim, *Ut res magis valeat quam pereat*.

The license to the Naugatuck Company was recorded September 16, 1844, and properly so. A license with a covenant that the parties will not grant any conflicting license, may be deemed a grant of an interest in the patent, and therefore to be recorded. Any subsequent grant or license, after such record, would be void as against the first. *Washburn v. Gould*, 3 Story, 160, 163.

Respondents allege that the reissues of the patent of June 15, 1844, are void.

That question cannot be inquired into in this suit, for the action of the commissioner granting the reissue is conclusive, unless a clear case of fraud is made out. *Day v. Goodyear*, MS. J. Grier, cited in Law's Digest, § 6, p. 617; *O'Reilly v. Morse*, 15 How. 63; *Allen v. Blunt*, 3 Story, 745; *Battin v. Taggart*, 17 How. 84; *Philadelphia and Trenton Railroad v. Stimpson*, 14 Pet. 458, 459.

If the action of the commissioner was not conclusive, the reissue of this patent has twice been judicially declared valid. *Goodyear v. Day*, MSS.; *Goodyear v. New England Car Spring Co.*, MSS.

These decisions were recognised and acted upon by this court in an action against these parties. It must be regarded as *res judicata*.

The claim for the product "vulcanized rubber" is not broader

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than the invention of Goodyear. The product is not claimed independently of the process by which it is produced. The claim is for the new article of manufacture, which is a combination of rubber with sulphur, whether with or without other ingredients, chemically altered by the application of heat, as described. If there are other methods substantially different, they and the products thereof belong to the inventors or the public.

The phrase "whether with or without other ingredients" must be construed in view of the specification. One method described therein is with sulphur alone, and another is by combining it with other ingredients. The claim, then, is for either of these two methods.

The claim for "subjecting india-rubber or other vulcanizable gums mixed with, or in the presence of sulphur, to the action of heat," &c., is not void by reason of claiming "other vulcanizable gums." The gist of the invention is not the material employed, and this does not limit the invention. The gist of the invention is the new process, and if that process is followed, the material operated upon does not take the process out of the scope of the invention. *Hotchkiss v. Greenwood*, 11 How. 248.

J. H. Parsons, A. Payne, C. Cushing, for defendants.

This suit cannot be maintained, for the reason that the will of Charles Goodyear, deceased, names three executors, and but one of them is made a party complainant. *Selwyn's Nisi Prius*, 80; *Wankford v. Wankford*, 1 Salk. 308; *Wms. Exr.* 235, n. 2; 3 Bacon's Abridg. 33; 1 Saun. on Plea. and Ev. 1111; 1 Chit. Plea. 20; *Bodle v. Hulse*, 5 Wend. 313; *Cro. Jac.* 420.

The patent granted to Charles Goodyear, June 15, 1844, and reissued December 25, 1849, and extended June 15, 1858, was invalid.

And the strongest proof is that the executor, in applying in 1860 for a reissue, claimed in the proposed new specification "all other ingredients," those claimed in the reissue of 1849 being only "a carbonate, or other salt, or oxide of lead."

The reissues of this patent, granted on the 20th of November, 1860, to Charles Goodyear, Jr., claiming to be executor of Charles Goodyear, deceased, were invalid.

On the 15th of June, 1844, a patent was granted to Charles Goodyear, deceased. On the 25th of December, 1849, the same was reissued, it having been surrendered, the bill alleges, "on account of a defective specification."

The patentee having died in July, 1860, his son, the first party named in the bill, claiming to be executor of his father's will, surrendered the reissued patent of 1849, and the same was again reissued to him, as an executor, on the 20th of November, 1860, in two patents.

The language of the claim of the reissued patent of 1849 is this:—

"What I claim as my invention, and desire to secure by letters-patent is the curing of caoutchouc, or india-rubber, by subjecting it to the action of a high degree of artificial heat, substantially as herein described, and for the purpose specified.

"And I also claim, the preparing and curing the compound of india-rubber, sulphur, and a carbonate or other salt, or oxide of lead, by subjecting the same to the action of artificial heat, substantially as herein described."

The claims of the reissued patent of 1860, or rather of the two patents, in which form it was then reissued, are these:—

Of the first:—

"What is claimed as the invention of Charles Goodyear, deceased, is the new manufacture called vulcanized india-rubber, which is a combination of india-rubber with sulphur (whether with or without other ingredients) chemically altered by the application of heat, substantially as described."

Of the second:—

"What is claimed as the invention of Charles Goodyear, deceased, is caoutchouc, or india-rubber, or other vulcanizable gums, mixed with or in the presence of sulphur (whether with or without other ingredients) and subjected to the action of heat, for the purpose of affecting its qualities or properties as described."

Now the differences between the reissue of 1848 and that of 1860 are these:—

The first claimed the curing of caoutchouc, or rubber, and sulphur by subjecting it to heat. And also the preparing and

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curing the compound of rubber, sulphur, and a carbonate or other salt or oxide of lead, by subjecting it to heat.

The second claims : —

1st. The new manufacture called vulcanized india-rubber.

2d. The subjecting caoutchouc, or india-rubber, or other vulcanizable gums, mixed with or in the presence of sulphur, to the action of heat, for the purpose of affecting its qualities.

8d. The so subjecting such compound, whether with or without other ingredients, to the action of heat, &c.

The first is for a process only ; the second for the process and the product.

The first limits the gums to be mixed and cured to caoutchouc, or india-rubber ; the second claims not only these, but all vulcanizable gums.

The first limits the other substances, with which caoutchouc, or rubber, and sulphur may be mixed, to a carbonate or other salt, or oxide of lead ; the second claims all other ingredients whatever.

The defendants consequently claim that this patent, as reissued, is wholly invalid, because it claims more than either the original invention or the reissued patent of 1849. It is " too broad, and not warranted by law." *O'Reilly v. Morse*, 15 How. 112.

Gutta-percha is neither caoutchouc nor india-rubber ; but it is notoriously a " vulcanizable gum."

The reissue of 1849 claims more than the original did. The original claimed " a carbonate or other salt or oxide of lead " ; the reissue claims all vulcanizable gums to be subjected to heat in combination with sulphur, whether with or without other ingredients. Now, there are some vulcanizable gums which cannot be vulcanized with the process set out in Goodyear's specification of 1849 ; add, however, two, sometimes three additional ingredients, and they can be vulcanized.

The license to the Naugatuck Company is not an exclusive license. The words " full and absolute " do not mean exclusive. The parties themselves so understood, for the license provides that in case Goodyear shall sell rights to others, the company shall have a claim for damages. Thus the instrument itself —

contemplates the granting of other rights under certain specified conditions, and the company has its remedy on the violation of these conditions, which clearly proves that it is not, nor was it at the time it was made, an exclusive license. As to the language and expressed intent necessary to constitute an exclusive license, see *Gayler v. Wilder*, 10 How. 495; *Brooks v. Byam*, 2 Story, 541.

But suppose the license was exclusive, defendants claim to manufacture under a license from Charles Goodyear, June 25, 1846, and that this was given with the assent of the Naugatuck Company, and with a waiver of its preemptive right in favor of the licensee, E. M. Chaffee.

It is the grant of a free right or license to Chaffee, first, to use Goodyear's metallic gum-elastic composition, for coating cloths for the purpose of japanning, marbling, and variegate japanning; and, second, together with all the rights to make and dispose of such japanned or marbled and variegated cloths, in and so far as Goodyear has obtained any rights, patents, or improvements, and in all that he may have, and in all patents granted and to be granted or belonging to said Goodyear.

The extension, on the 14th of June, 1858, of the patent granted Charles Goodyear, deceased, by the commissioner of patents, was procured by said Goodyear upon a false and fraudulent representation, for the purpose of deceiving the commissioner and the public, and of obtaining said extension, in fraud of the requirements of the act of Congress in this behalf.

The fraud in the extension of 1858 consisted, first, in collusion between the friends and certain pretended opponents of the patent, whereby the commissioner was deceived.

In discussing the law, as applicable to the fraud thus proven, the defendants begin, by asserting the principle, that fraud avoids everything *ab initio*, both in law and equity, "whether the object be to deceive the public or third persons, or one party endeavor thereby to cheat another." Bouvier's Law Dictionary, 547, and cases there cited. See *Dalmer's case*, Plowd. 346; *Fermor's case*, 2 Co. 202; *United States v. Gomez*, 23 How. 326; *Whittemore v. Cutter*, 1 Gall. 434; *Odiorno v. Winkley*, 2

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Gall. 51; *Gray v. James*, Pet. C. C. 401; *Whitney v. Emmett*, Bald. 309; *Stimpson v. West Chester Railroad*, 4 How. 380; *Clum v. Brewer*, 2 Cur. 518.

The defendants are entitled to have the material issues of fact in this case submitted to a jury. The first question of fact raised is, whether the patent granted Goodyear, June 15, 1844, reissued December 25, 1849, extended June 15, 1858, was valid. This patent has never since the date of its original issue been before a jury. It has never received a final adjudication from a court of last resort. See *Davis v. Palmer*, 2 Brock. 308; *Reutgen v. Kanours*, 1 Wash. 171; *Park v. Little*, 3 Wash. 197; *Carver v. Braintree Co.*, 2 Story, 441; *Parker v. Stiles*, 5 McLean, 55; *Battin v. Taggart*, 17 How. 85.

The second question is, whether or not the reissues of 1860 are valid.

This question was discussed, in its legal aspect, under the third point of the brief.

The court may be satisfied, in view of the rules of law as gathered from the authorities there cited, that this patent, as reissued, is absolutely void upon its face, as compared with the surrendered patent, and that no further discussion is to be had upon it.

If not, they are proper questions for a jury, under this point, and special reasons why they should be tried by one. The answer denies, absolutely, the validity of this reissue, on all grounds. Then we may ask a jury: Was there any fraudulent intent on the part of the executor in applying for this reissue? Did he know what men of science had done between 1849 and 1860? Was this extension applied for deliberately and fraudulently, and with the design to make this patent "more elastic and expansive, and more available for the suppression of all other inventions?"

The question whether the reissue is for a new or another invention, or contains a broader claim, is proper for a jury. So is the question of fraud in obtaining it. *Stimpson v. West Chester Railroad*, 4 How. 404; *Carver v. Braintree Co.*, 2 Story, 441; *Battin v. Taggart*, 17 How. 85; *Brooks v. Fiske*, 15 How. 220.

This third issue raised is, whether or not the articles made or the process by which they are made by the defendants infringe any rights of the complainants.

The question certainly deserves to be considered and to be the subject of a trial by jury, whether the gums discovered after the Goodyear invention, are not, in fact, different substances, on which his patent will not act, and to which it could not have been intended to apply; and, consequently, it is certainly a fair question to be submitted to a jury, whether or not the process or processes, which the defendants use, are infringements of the Goodyear process; and this constitutes a special reason why issues should be granted in this case.

- It is an almost universal rule that fraud is a question for a jury to decide. *Burlew v. O'Neil*, Law's Am. Dig. 340. See also Law's Am. Dig. 456; *Sherwood v. Marwick*, 5 Greenl. 295; *McDonald v. Trafton*, 3 Shep. 225; *Myers v. Hart*, 10 Watts, 104.

The defendants now refer the court to authorities upon the general question of issues out of chancery, their nature, and in what cases they will be granted. See 2 Dan. Ch. Prac. 1085, 1118, *et seq.*; 2 Smith's Ch. Prac. 74, *et seq.*; Adams's Eq. 376, *et seq.*, and notes; Story's Eq. Juris. § 1478. See also *Kent v. Burgess*, 11 Simons, 361, in which the court granted issues before the publication of the evidence. See also *Casborne v. Barsham*, 2 Beav. 80.

Courts of equity have, for a great number of years, where questions of fact have been disputable, thought it a more proper exercise of their jurisdiction to have them tried by a jury. *Dawson v. Carter*, 9 Mod. Rep. 9; *O'Connor v. Cook*, 8 Ves. Jr. 535; *Dexter v. Providence Acq. Co.*, 1 Story, 387.

A jury trial will be ordered where such a course will be most conducive to the ends of justice. *New Orleans Co. v. Dudley*, 8 Paige, Ch. 452. See also *Belknap v. Trimble*, 3 Paige, Ch. 601; *East India Co. v. Donald*, 9 Ves. Jr. 274; *Garwood v. Eldredge*, 1 Green, Ch. 290.

If important rights are depending on questions of fact, a feigned issue may properly be awarded. *Apthorp v. Comstock*,

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2 Paige, Ch. 482. See also *Winchester v. Fournier*, 2 Ves. Sen. 446.

The strictest application of the rule is, that the granting of issues is a matter resting in the discretion of the court. *Hampson v. Hampson*, 3 Ves. & B. 43. See also *Field v. Holland*, 6 Cran. 8; *Brockett v. Brockett*, 3 How. 691; *Adams's Eq.* 815; 3 Greenl. Ev. § 266.

CLIFFORD, J. The general rule is that an interlocutory order for issues to a jury in an equity suit will not be directed until all the proofs are taken and publication has passed. The reason for the rule, as stated, is that such an order should not in general be granted at all where the truth of the facts can be conveniently and satisfactorily ascertained by the court itself; and as that question cannot usually be determined in advance of publication, the motion should be deferred to that stage of the controversy. *Whitaker v. Newman*, 2 Hare, Ch. 302; *Dale v. Roosevelt*, 6 John. Ch. 255; *United States v. Sampersac*, 1 Hemp. 126; *Clayton v. Meadows*, 2 Hare, Ch. 29; *Adams's Eq.* 376; *Baker v. Williamson*, 2 Penn. St. R. 116; *Johns v. Erb*, 5 Penn. St. R. 237.

Oral testimony undoubtedly, if the order be granted, may afterwards be introduced before the jury, but the better practice is to defer the granting of the motion until the whole evidence to be taken under the equity rules is before the court. *Lee v. Beatty*, 8 Dana, 207.

¶ The Federal courts under the Constitution of the United States and the laws of Congress, as now existing, have the power of deciding every question of law or fact which may arise in equity suits over which they have complete jurisdiction, and consequently it is not indispensably necessary as matter of law in any case that any question in an equity suit should be sent to a jury. *Fornshill v. Murray*, 1 Bland. Ch. 485; *Ward v. Hill*, 4 Gray, 593.

Trial by issue, indeed, forms no necessary appendage to a court of equity even in the parent country, and never did, except that, perhaps, an heir at law, where the object of the suit was to divest him of a freehold estate of which his ancestor died seised; or the rector of a parish, where his common-law right to tithes was

drawn in question, might be entitled to issues as matter of right. Excepting those cases, it is clear that the motion for issues was always regarded as one addressed to the sound discretion of the chancellor; and it was for him to determine whether, in view of the whole evidence, as exhibited in the record, he would decide the controversy himself or send it to the common-law courts for the opinion of a jury. 2 Dan. Ch. Prac. 1090.

When the chancellor directs such an issue, he, in general, does it upon the ground, that the evidence produced before him in the record, is not of a character, or not sufficient, to enable him to arrive at a satisfactory conclusion. Such being the state of the case, he directs the issue to be tried by a jury, for the purpose of collecting additional evidence to enable him to decide the cause. Consequently the verdict, when certified from the court to which the issues were sent, is never to be regarded as conclusive, but only as advisory, and may be set aside, or even overruled. *Silsby v. Foote*, 20 How. 885; 3 Greenl. Ev. § 261.

The Circuit Court held in that case that the patent was valid, notwithstanding the verdict of the jury to the contrary, and also that the defendant had been guilty of an infringement; and the Supreme Court affirmed the decree.

Judge Story also says, in substance and effect, that the verdict is never, in point of law, conclusive upon either party. Story's Eq. Juris. § 1479; *Barnes v. Stuart*, 1 Y. & C. 119. Chitty Eq. Dig. 2856.

The practice accordingly is, that the party against whom the verdict is, has the right, notwithstanding the verdict, to proceed in the cause, and if the evidence was not closed under the rules, or if closed, by leave of court first had and obtained, to go into evidence in support of his case. *Ansdell v. Ansdell*, 4 My. & Cr. 454.

Twelve years ago a similar application was made to the presiding justice of the Third Circuit, and he refused to grant the motion, substantially upon the ground that the merits of the controversy involved no difficulties which would be removed or confirmed by the verdict of a jury. *Goodyear v. Day*, 2 Wall. Jr. 296.

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Applying those rules to the present case, it only remains to say, that upon a careful examination of the record it does not appear that the questions presented, and the state of the evidence, are such that the verdict of a jury is necessary to enable the court to reach a satisfactory conclusion.

Reference will only be made to such of the defences, set up in the answer, as were urged upon the consideration of the court at the final hearing.

Defences set up in the answer, which were not pressed at the argument, will be regarded as waived. The argument for the respondents objects to the right of the complainants to maintain the suit upon four special grounds, which will be separately considered, before proceeding to the examination of the questions usually regarded in such cases as more immediately involving the merits of the controversy.

The first special objection is, that only one of the persons named as executors in the last will and testament of the original patentee is made a party to the bill of complaint.

The second objection is, that the reissued patents on which the suit is founded are invalid, because the description of the alleged invention, and of the manner and process of making, constructing, using, and compounding of the same, as contained in the respective specifications, is not set forth in such full, clear, and exact terms, as to enable any person skilled in the art or science to which it appertains to practise the invention.

The third objection is, that the last-mentioned reissued letters-patent are severally invalid, because the present patentee claims therein more than was invented by the original applicant, or, in other words, that the reissued letters-patent are invalid, because they, or either of them, are not for the same invention as that for which the original patent was issued.

The fourth objection is, that the extension of the patent granted to the original patentee, as already described, was procured by false and fraudulent representations, and therefore was null and void.

When there were several executors, the general rule at common law was that they must all join in the suit, though some

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were not of the required age, or had not proved the will, or had actually renounced before the ordinary. *Smith v. Smith*, Yelv. 130; *Brooks v. Stroud*, 1 Salk. 3; *Hensloe's case*, 5 Co. 64; *Creswick v. Woodhead*, 4 Man. & G. 811; *Bodle v. Hulse*, 5 Wend. 313.

The reasons assigned for the rule were that all have the right to sue, and that neither the delay in proving the will, nor the renouncement before the ordinary, were sufficient to bar the right, and consequently that the executors not joined were still at liberty, whenever they pleased, to come in and accept the trust. 4 Bac. Abr. 41; 2 Wms. Ex. 1588.

The principle of the rule is, that where the right to sue is derived under the will of the testator, the right to sue is equal in all the executors, and in such cases all must join in the suit, as in debt on bond given to the testator, or in a suit upon a bill of exchange or promissory note given to him while in full life. But where the right to sue is derived under the probate, and not under the will, as where the promise is to the executor, and of course subsequent to the death of the testator, the executor alone may sue, to whom the promise was given. *Brassington v. Ault*, 2 Bing. 177; 1 Saund. on Plea. & Ev. 1111.

When the action is on a contract with the decedent, or for a tort to the goods before they actually came to the possession of the executor, the suit can be brought only on the title of the decedent, and consequently can only be maintained in a representative character; but where it is on a contract with the executor, express or implied, made after the death of the testator, or where it is for the price of goods sold by the executor, or for the tortiously taking the goods from his possession, or for converting or detaining the goods after the same are so taken, or for any tort to the goods while in the possession of the executor, the opinion is expressed in some jurisdictions that the suit, under such circumstances, can only be maintained by the executor in his own right, and the fact that he is named in the contract, in the first example supposed, will not have the effect to change the nature of the remedy. *Kline v. Guthart*, 2 Penn. Rep. 491; *Heron v. Hoffner*, 3 Rawle, 393; *West v. Chappell*, 5 Gill, 228; *Gayle v. Ennis*, 1 Texas, 184.

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Other courts hold, and perhaps for better reasons, that executors may in all cases sue in their representative character, where the money when recovered would be assets belonging to the estate, but all courts concede that the rule, as last stated, can only apply where all the executors participate in the contract, and that it does not make those parties to the contract who were not parties in point of fact. *Heath v. Chilton*, 12 Mee & W. 638; *Cowell v. Watts*, 6 East, 405; *Powrey v. Newton*, 6 Taun. 453; 1 Ch. Pl. 204.

All concede, as before remarked, that where the promise is to the testator, the suit, to be regular, must be in the name of all the executors named in the will, if alive; but the same authorities agree, that the defendant can only take advantage of the non-joinder of one or more of the number by plea in abatement, after oyer of the probate, unless the defect is apparent on the face of the record. 1 Wms. Saund. 292, i. n. (k.); 1 Saund. on Plea. & Ev. 1111; *Parker v. Willson*, 15 Wend. 345.

The rule, as stated in a work of standard authority, is, that if only one of several executors or administrators bring an action, either of debt or assumpsit, or in tort, it is settled that the defendant can only take advantage of the non-joinder of the executor or administrator by pleading in abatement, after oyer of the probate or letters of administration, that the other executor or administrator therein mentioned, is alive and not joined in the action. 1 Ch. Pl. 20.

Unless the defendant plead the non-joinder in abatement, he is estopped from setting up the defence, as he cannot be allowed to prove the fact of non-joinder under the general issue. The correct practice on the part of the plaintiff is to sue in the name of all the executors, and if, on the return of the sheriff or marshal, one or more named in the will refuse to appear and qualify and join in the prosecution of the suit, the residue must resort to the process and proceeding of summons and severance. 2 Wms. on Ex. (4th Am. ed.) 1186, note *t*.

The practice is, that if one or more of the executors will not join with the rest in prosecuting the action, the court will issue a writ of summons *ad sequendum simul*, and upon their non-

appearance at the return of it, will give judgment of severance, so as to enable the rest to proceed without them. 1 Tidd's Prac. (per Troubat), 129 ; 20 Vin. Abt. 51 W. 55.

Such are the material rules and the course of proceeding upon this subject in actions in common-law jurisdictions, where there are no paramount statutory regulations. Most of the States have such regulations, rendering it competent for such of the executors as have proved the will, to prosecute the suit without the necessity of resorting to any such proceeding as that to which reference has been made. Were this a suit at common law, the complainants assume that the statutory regulations of this State would furnish the rule of decision. But it is unnecessary to examine that question at the present time. State regulations, to the extent that they define the rules of property, are regarded as furnishing the rule of decision, but they do not control or affect the process or practice of the Federal courts. *Wayman v. Southard*, 10 Wheat. 1.

The present suit, however, is not one at common law, but is a bill in equity, wherein the laws of the State have no pretence of application in the question under consideration. In the Federal courts the equity practice, when not controlled by an act of Congress or the rules prescribed by the Supreme Court, is in general regulated by the chancery practice of the parent country, as it existed prior to the adoption of what is called the "New Rules." Suppose it were otherwise, however, and that the question presented was really one to be controlled by the analogies of the common law, still it is quite obvious that the objection cannot be sustained. The bill of complaint is not founded on the title of the original patentee, but on the derivative title of the first-named complainant as executor of the last will and testament of Charles Goodyear, deceased. Were the suit founded on the last patent issued to the decedent, as it subsisted at the time of his decease, the analogy of the common law, if applicable to the case, would support the theory of the respondents. But such is not the fact, as every one must admit who has read the pleadings. The reissued patent on which the suit is founded is a new contract made between the government and the first-named complainant

since the decease of the original patentee. The proofs show that the other persons named as executors did not prove the will, and that they had nothing to do either with the surrender or the reissue of the letters-patent on which the suit is founded. The consequence was that they were not named in the letters-patent, and, of course, are not patentees in any sense whatever. The damages to be recovered, if any, may belong to the estate, but it is clear, even in cases where the rules of the common law apply, that the circumstance that the damages to be recovered may become assets, is not sufficient of itself to make any one a party to the contract who did not participate in the transaction, and who was not so in point of fact.

The second special objection is, in effect, that the description of the alleged invention, and of the manner and process of making, using, and compounding the same, as contained in the respective specifications, is not set forth therein in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to practise the invention. The reply of the complainants to this objection is, that such a defence is not open to the respondents, because none such is set up in the answer; and upon a careful examination the suggestion appears to be correct. The record shows that application was made to the court for leave to amend the answer in that behalf, but upon full consideration the motion was denied. The suggestion of the complainants is decisive, and the objection is accordingly overruled. *Foster v. Goddard*, 1 Black. 518; *Sims v. Guthrie et al.*, 9 Cran. 19; *Harrison v. Nixon*, 9 Pet. 483; *Boon v. Chiles*, 10 Pet. 178; *Tripp v. Vincent et al.*, 3 Barb. Ch. 613.

The next objection of the respondents is, that the respective reissued letters-patent on which the suit is founded are invalid because the present patentee claims in each of them more than was invented by the original applicant. The original patent was granted to the inventor on the 15th of June, 1844, as alleged in the bill of complaint. The same was surrendered and reissued to the original patentee on the 25th of December, 1849, on account of a defective specification. The letters-patent, as reissued, were extended on the 15th of June, 1858, for the further term

of seven years. The inventor died on the 1st of July, 1860, and his son, Charles Goodyear, Jr., was appointed his executor. His first step, as such executor, was to surrender the patent, as previously reissued to the inventor, and the same was thereupon reissued to him, as executor, in two parts. The last-mentioned letters-patent are those on which the present suit is founded.

The proposition of the respondents is, that both of those patents are void for several reasons. Briefly described, one of the patents is for a new product or manufacture, and the other is for a new process or method by means of which the new product or manufactured article is produced. The theory of the respondents is, that they are both void. 1. Because the subject-matter of the respective claims was not separable. 2. Because each of the respective claims, as they insist, is broader than the invention made by the original patentee.

In the judgment of this court, the first objection is wholly untenable. The legal effect of the fifth section of the act of the 3d of March, 1837, is to authorize the Patent Office, whenever a patent is properly returned for correction and reissue, under the thirteenth section of the prior act of Congress conferring such authority, to reissue the same in several patents for distinct and separate parts of the thing patented, provided the patentee shall desire it, and shall pay the additional sum or sums required, as specified in the provision. 5 Stat. at Large, 192. No doubt can be entertained that a new product or manufacture, and a new process or method of producing the new article, are the proper subjects of separate and distinct claims in an original patent; and if so, then it is equally clear that the patentee under that provision, upon a return of the patent for correction and reissue, and upon complying with the conditions therein specified, may have several patents for the distinct and separate parts of his invention.

The second objection, however, is entitled to more weight, and will deserve more consideration. The claim of the patent, as reissued to the original inventor, was as follows: "What I claim as my invention, and desire to secure by letters-patent, is the curing of caoutchouc, or india-rubber, by subjecting it to the action

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of a high degree of artificial heat, substantially as described, and for the purpose specified; and I also claim the preparing and curing the compound of india-rubber, sulphur, and a carbonate or other salt, or oxide of lead, by subjecting the same to the action of artificial heat, substantially as herein described." Appropriate words are used in both claims referring back to the descriptive portions of the specifications.

India-rubber, as the patentee states, was useless in its native state for many of the purposes for which it may be used, for the reason that it will become soft and sticky, and finally dissolve under the action of a moderate degree of heat. His effort was to discover some method of preparing it by which its melting or softening property should be removed or neutralized. Partial results were at first attained, but not sufficient to render the discovery of general practical utility. At length, however, he became impressed with the idea that the native rubber might be subjected to heat, in the process of preparation, at some degree of temperature beyond the highest to which the fabric would be exposed in its ordinary use. Experiments were accordingly instituted, and the result was that the patentee discovered that he could accomplish the desired end.

Those experiments showed that the native rubber, when subjected to heat by itself, could not be cured or deprived of its sticky or soluble properties, which led him to experiment upon it in connection with other substances. When compounded with sulphur, by the application of a high degree of artificial heat, he obtained a good result, but when compounded with sulphur and the carbonate of lead he obtained the best result. All the experiments, however, showed that a satisfactory result could not be obtained without the action of a high degree of artificial heat, which the patentee states is the great agent in his method of curing the native rubber. The nature of the first part of the invention, as stated by the patentee, consists in curing the native rubber when combined with, or in the presence of, sulphur, by submitting the same to the action of a degree of artificial heat.

The second part of the invention consists in prepar-

curing the compound of the native rubber, sulphur, and a carbonate or other salt, or oxide of lead, for the accomplishment of the purpose described. "Any other mode of reducing and dissolving the india-rubber, and compounding it with the other substances," says the patentee, "may be substituted for that above described; and although I have described the compound as consisting of india-rubber, sulphur, and white lead, I do not mean to limit myself to this compound. When a high degree of artificial heat is used, as good results may be and have been obtained by me, by dispensing with the lead; and it is immaterial, so far as regards the principle of my invention, whether the sulphur is incorporated with the india-rubber by admixture in the solid form, or spread on the surface thereof, or combined therewith in the gaseous or other form, previous to or during the process of curing by heat."

The claim of the patent for a new and useful improvement in the manufacture of caoutchouc, as reissued to the present patentee, is as follows: "What is claimed as the invention of Charles Goodyear, deceased, is the new manufacture called vulcanized india-rubber, which is a combination of india-rubber with sulphur (whether with or without other ingredients), chemically altered by the application of heat, substantially as described.

The phrase, "whether with or without other ingredients," is the one to which the objection under consideration is particularly applied. The rule, *ut res magis valeat quam pereat*, is as applicable to patents as to any other instruments in regard to which it is the duty of the court to adopt a liberal construction, in order to give effect to the intention of the parties. *Ryan v. Goodwin*, 3 Sumn. 520; *Evans v. Eaton*, 3 Wheat. 512.

The duty of the court is to collect the intention of the parties from the whole instrument, and, if practicable, to adopt such construction as will give it effect, and render it available for the purpose for which it was granted. Applying that rule to the present case, it is obvious that the objection to the first patent, on which the suit is founded, cannot be sustained.

Reference is made in the body of the specification to the use of sulphur, in combination with the native rubber, and to the

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subjecting of the compound to the action of a high degree of artificial heat, precisely as in the prior patent issued to the original patentee. Mention is then made, substantially as in the prior patent, that other substances, to wit, white lead, or other salts of lead, may be combined with the mixture composed of native rubber and sulphur, "thereby forming a triple compound." Plainly, therefore, the words "other ingredients," as used in the claim, refer to the ingredients other than native rubber and sulphur, as used in the specification; and when so understood, the language of the claim is free from objection.

The description of the claim in the other patent, on which this suit is founded, is in the following words, to wit: "What is claimed as the invention of Charles Goodyear, deceased, is the subjection of caoutchouc, or india-rubber, or other vulcanizable gums, mixed with or in the presence of sulphur (whether with or without other ingredients), to the action of heat, for the purpose of affecting its qualities or properties as described. The same objections are made to this claim as to the claim of the preceding patent, and they must be overruled for the same reasons.

But another objection is taken to this claim of a very different character. The express terms of the claim make it include not only native rubber, when compounded with sulphur and subjected to a high degree of artificial heat, but all other vulcanizable gums, whether with or without other ingredients. Nothing of the kind is described in any one of the patents granted to the original inventor, nor even in the patent to which the claim is annexed.

Under the circumstances, I am of the opinion that the claim of this patent is broader than the invention of the original patentee, and consequently that it is void, because it is not for the same invention as the patent which was surrendered as the foundation of the reissue. *O'Reilly v. Morse*, 15 How. 112; *Battin et al. v. Taggart*, 17 How. 83; *Burr v. Duryee*, 1 Wall. S. C. 531; *Leroy v. Tatham*, 14 How. 175.

The fourth special objection is, that the extension of the patent granted to the original patentee, was procured by false and fraudulent representations, and therefore was null and void.

The answer alleges that the licensees of the patentee had the exclusive management and control of the application for the extension ; that they paid the expenses of the application ; and that for the purpose of fraudulently procuring the commissioner to grant the same, they paid large sums of money to sundry persons, to induce them to withhold or withdraw opposition to the application, and thereby wilfully and fraudulently caused the suppression of facts which, if they had been made known to the commissioner, would justly and legally have prevented him from granting the extension.

Special mention is then made of a person who appeared and made opposition to the application, and the allegation is, that the licensees, for money, induced him to withhold his opposition, but not to withdraw his appearance, in order that it might fraudulently appear that all the facts which could be adduced against the application, were brought to the notice of the commissioner.

Strong doubts are entertained whether the allegations of the answer are sufficient to constitute a defence in this case, but it is not necessary to place the decision upon any such ground, as I am of the opinion that the defence cannot avail the respondents for several reasons, which will be briefly stated.

Suit is brought in this case against the respondents as infringers, and in the judgment of this court, the defence that the patent as reissued to the original patentee, was extended by fraud, as set up in the answer, cannot avail them as a justification for the acts alleged in the bill of complaint. *Field v. Seabury*, 19 How. 332 ; *Gibson v. Gifford*, 1 Blatch. 529.

The decision of the commissioner was made by a tribunal with full powers to examine and decide, and inasmuch as there is no provision for an appeal to any other jurisdiction, the decision must in general be regarded as final, in all collateral proceedings. *Colt v. Young*, 2 Blatch. 471 ; *Foley v. Harrison*, 15 How. 448 ; *Bartlett v. Kane*, 16 How. 263 ; *Jackson v. Lawton*, 10 Johns. 24.

Where the imputation of fraud arises in a proceeding between the government and the patentee, to set the patent aside, or where the question arises between the patentee and a third person whose

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rights of property were directly involved in the question of extension, proof of fraud in obtaining the extension is sufficient to defeat the patent; but the proof, to avail the party making the imputation, must be clear and satisfactory. *Battin v. Taggart*, 17 How. 84; *Woodworth v. Stone*, 3 Story, 753; *Brooks v. Fiske*, 15 How. 228; *Brooks v. Bicknell*, 3 M'Lean, 435; *Field v. Seabury*, 19 How. 332.

The proof in this case that the extension was procured by fraud is not satisfactory. On the contrary, it shows, taken as a whole, that the extension was granted on account of the just claim of the inventor, and the great merit of the invention.

But if it were otherwise, still the defence, under the circumstances of this case, cannot avail the respondents, in the judgment of this court, because they consented to the acts which are now the subject of complaint. *S. and S. Railroad v. Row*, 24 Wend. 74.

Suppose the patent was duly extended, still the respondents contend that they are not liable, because they insist that Charles Goodyear, deceased, was not the original and first inventor of the improvement embodied in the first-mentioned reissued letters-patent on which the suit is founded. That proposition embraced both of the reissued letters-patent described in the bill of complaint; but having come to the conclusion that the other is void, because the claim is broader than the invention, it is unnecessary to remark further upon it at the present time. The record shows that the questions involved in that proposition have been repeatedly heard and determined in the Circuit Courts of the United States. Suffice it to say, that this court, under the circumstances, considers it proper to follow those decisions. Many years have elapsed since they were announced, and, so far as appears, there has been no effort made to call them in question. They are believed to be correct, and consequently are adopted upon the point under consideration.

My conclusion, therefore, is, that Charles Goodyear was the original and first inventor of the improvement described in the first-mentioned reissued patent on which this suit is founded.

The admission of the respondents is, that in the manufacture

of india-rubber goods they use a compound of india-rubber in which sulphur is present when the composition is subjected to the action of artificial heat, so as to produce the changes and effects mentioned in the bill of complaint. Taken as a whole, the evidence is so full that the respondents must be regarded as infringers, unless justified under a certain license set up in the case, that it seems unnecessary to pursue the investigation.

The last proposition submitted by the respondents is, that they are not infringers, because they manufacture their goods under a license from the original patentee, which, as they insist, is valid and outstanding, and is a complete defence to the present suit. The license referred to is dated the 25th of June, 1846, and is signed by the original patentee. Free license is thereby granted to E. M. Chaffee, his executors, administrators, and assigns, for and in consideration of \$1, to use the said Goodyear's metallic gum-elastic composition for coating of cloths for the purpose of japanning, marbling, and variegate japanning, at his own establishment, but not to be disposed of to others for that purpose without the consent of said Goodyear. Two answers are made by the complainants to that defence. 1. They refer to a license of prior date held by them, and contend that by the true construction it confers upon them the exclusive right to use any and all of the inventor's improvements for manufacturing cloths, or any other article of merchandise, or any article to which the same may be applicable. 2. But if the court holds otherwise, then they contend, in the second place, that the license under which the respondents profess to act, confers no authority even upon the licensee therein named to manufacture any of the articles specified in the bill of complaint.

The first proposition of the complainants, in the judgment of this court, cannot be sustained, because the patentee expressly reserved to himself, his heirs, executors, administrators, or assigns, the right to sell for a stipulated price or sum, in gross, the exclusive right for the unexpired period or periods, for which the same may be vested in him or them, of making, using, or vending said preparations or improvements, or of applying the same to or for any specified purpose or purposes only, or to and for all

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the purposes and uses to which said improvements may be adapted or applied. The legal effect of the proviso following the reservation is not, in the judgment of this court, to render the reservation void, but only to impose upon the party granting the license, the obligation to extend the pre-emption right of purchase to the licensees, and in case of non-compliance with his agreement, to render him liable in damages.

Granting all that, still I am of the opinion that the complainants must prevail upon the second ground. The respondents' license, or the one under which they claim to act, authorizes the licensee therein named, to use the inventor's metallic gum-elastic composition for coating cloths, for the purpose of japanning, marbling, and variegate japanning; but there is not a word in it to justify the conclusion that it confers any authority to manufacture the articles which are the subject of controversy in this suit. Abundant evidence appears on the face of the instrument, that it was intended to apply only to the particular style of goods therein mentioned and described. First, the licensee was to have a free license to use the described composition for coating cloths for the purpose of japanning, marbling, or variegate japanning. Second, he was to have all the right to make and dispose of the aforesaid japanned, marbled, or variegated cloths, in and so far as the patentee had obtained any rights, patents, or privileges. Third, the patentee covenanted not to dispose of concurrent rights to any other person or persons, for the manufacture of cloths for the purposes aforesaid. Fourth, the licensee was to pay at the rate of three cents per square yard of cloth japanned, marbled, or variegated as aforesaid. Fifth, he was to keep regular books of account of all manufactured cloths to be japanned. Sixth, the license closes with these words: "In the event of any improvement being made in the manufacture or composition of said gum-elastic for the aforesaid purposes, such improvements shall become the property of said Goodyear, and may be patented by him at his own expense, and for the use of the licensees, and his assigns for the purposes aforesaid, according to the terms of this license so far as said improvements may apply to the manufacture of japanned, marbled, and variegated cloths, as aforesaid."

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For these reasons, I am of the opinion that the respondents, acting under that license, are restricted to the manufacture of cloths to be japanned, marbled, and variegated, as therein described, and that it confers no authority to manufacture any of the articles specified in the bill of complaint.

Decree for complainants.

JOHN G. FORBES, ROBERT SQUIERS, WILLIAM M. RAYMOND, WILLIAM H. FORBES, and BURNETT FORBES, *v.* THE BARSTOW STOVE COMPANY.

Although a surrender of an original patent is the act of the party making the application, still the application may be withdrawn, under leave of the Commissioner, for good cause shown, at any time before the proceedings are fully completed and duly recorded. Reissued letters-patent supersede the original, but a pending application for the purpose of reissue, does not have that effect, no matter how nearly the proceedings may have approached a consummation, so long as they are not fully completed.

Prior to the issue of the new patent, the surrender, so called, is nothing but a preliminary offer, which is a necessary means of obtaining a reissue, and may be so treated by the Commissioner, at the request of the party applying for the reissue, in the absence of fraud.

In this case it was held that the evidence showed the application to have been withdrawn and the duty refunded for good and sufficient reasons.

The patent in this case was for an air-tight coffin, corresponding nearly with the human form, composed of two parts, or shells, united by a flanch, each shell being made of cast or raised metal, so as to resist great external pressure, and require less weight of metal than ordinary metal coffins, and each forming a part of the receptacle for the body, and having the line of their juncture nearly at the line of the greatest diameter of the body; *held*, that the subject of the patent was not the same as the ancient mummy cases of Egypt, and that those mummy cases were not of a character to supersede the invention because they are of wood; they are not impervious to air; they are not composed of two shells united at the line of the greatest diameter of the body; only one of their parts was employed as the enclosure of the body; the two parts were not united by a flanch, and did not both conform to the shape of the human body.

here a defendant did not set out in his answer to a bill for the infringement of a patent, an invention upon which a caveat had been filed, and when subsequently, with leave of court, testimony concerning the invention was taken and filed in the case, but no corresponding amendment was made in the answer, doubts are entertained whether the testimony as properly in the case.

invent describing a cast-iron case, without any bottom, to let down over an ordinary tin, after the latter was deposited in the grave, to serve for a covering and protection *reito*, was *held* not to be of a nature to supersede the invention patented, in this case, ough the caveator had specified that the metal case might be used for a coffin.

expression must, in construing the caveat, be taken in connection with the statement

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that the invention was intended to supply the place of a rough coffin, or a brick or stone vault, and to contain and enclose a common coffin.

The patent granted to Amos C. Barstow, April 19, 1859, was held to be an infringement of the reissued patent on which the suit in this case was founded.

Where the patentee is the original and first inventor of that which is described in his patent as his invention, he has a right to treat as infringers all who make and sell substantially the same thing, even though the infringing machine or structure may be an improvement on the patented one.

Whenever it is set up in defence, that the respondent has substantially departed from an existing patented machine or structure, he must show, or it must appear, that the departure or difference is such as involves inventive genius, and that the change is not within the scope of mere mechanical skill.

Improvement of a patented invention is not in general an answer to the charge of infringement; and the defence that the article produced by the respondent is not as good as that of the complainant, is untenable and inadmissible, especially if it is shown to embody all the characteristics which distinguish the article alleged to be infringed.

The *prima facie* presumption is, that a reissued patent has been properly surrendered and reissued; and that presumption will prevail in the absence of any controlling evidence to the contrary.

Non-joinder of licensees in a bill for an infringement of a patent, constitutes no defence after the cause has been set down for final hearing.

The two principal purposes of the specification of a patent are, to enable the public to know of what the patentee claims to be the inventor, and to enable the public to practise the invention when the patent has expired.

The patentee in his specification, does not address himself to the uninformed, but to persons of skill in the art to which the invention appertains, and he is only required to use such full, clear, and exact terms in his description as will enable persons of this class to produce the thing he describes.

THIS was a bill in equity, praying for an account and for an injunction against the corporation respondents, for an alleged infringement of certain letters-patent belonging to the complainants. Letters-patent were granted to one Almond D. Fish, of New York, for a new and useful improvement in coffins. Title to the patent was subsequently acquired by John G. Forbes and Robert Squires, as assignees, and on the 6th of March, 1860, the same was surrendered and reissued to them as such assignees, for the term of fourteen years from the date of the original patent. The patentees were parties to the bill of complaint, and the other parties were made such because they claimed to hold certain local rights to make and vend the thing patented, either as assignees or exclusive licensees, under the reissued patent. The answer denied, in the first place, that the assignor of the last patentees was the original and first inventor of the improvement; and, secondly, that the respondents were in any way guilty

of any infringement of the supposed invention. Several other defences were also set up by the respondents, which it becomes necessary to mention, as appertaining to the merits of the controversy. They contended that the original patent was not lawfully surrendered, and therefore that the reissued patent was illegal and void; also that the surrender of the original patent was made, and the reissue procured, by the false and fraudulent representations of the last patentees; also that the commissioner of patents, under the circumstances disclosed in the pleadings and evidence, exceeded his authority in granting the reissue, because, as defendants contended, it appeared that all of the assignees did not apply for the same; and also because it appeared on the face of the patent, that the reissue was not for the same invention as the original. It was also insisted that the description of the invention was not in such full, clear, and exact terms as would enable any person skilled in the art to which it appertained to construct the patented article.

Pending the suit, on the 17th of November, 1862, the defendants filed a motion that the bill of complaint should be dismissed, alleging for cause, that the letters-patent on which the suit was founded had been surrendered since the suit was commenced.

The bill of complaint was filed on the 1st of October, 1860; and the allegation of the motion was, that the complainants, on the 13th of November, 1862, surrendered the reissued patent described in the bill of complaint, and that the same was under that date again reissued. Leave was accordingly granted to both parties to take further testimony, not only as to the alleged surrender of the patent as specified in the motion to dismiss, but also in respect to the questions growing out of the prior surrender and reissue; and also in respect to the novelty of the invention. The motion to dismiss was argued at the same time with the merits of the controversy, but inasmuch as the question involved in it was preliminary in its nature, it was first considered by the court.

The claims of complainants' patent were as follows:—

1st. The manufacturing of coffins of cast or raised metal, when made substantially in the form and manner above described,

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that is to say, corresponding nearly with the human form, and making the coffin in two parts, or shells, united by a flanch, substantially as above set forth.

2d. The manufacture of coffins of raised or cast metal, in two shells, each formed with recesses of greater or less depth, which shall respectively constitute a portion of the receptacle of the corpse, thus approximating the coffin more nearly in shape to that of the human body than could otherwise be done.

The respondents claimed the right to manufacture under a patent of which the following is a portion of the description of the specification and the claims:—

“The object of the present invention is to obtain all the advantages of a metallic burial-case, without the objections of excessive weight, or expense, and at the same time combine the desiderata of beauty of form and additional strength. I effect these results by forming the burial-case at its ends, i. e. at the ends corresponding to the head and feet of the corpse, in ogee forms, or nearly so, and the main body, or lower portion thereof, with overlapping ribs, for giving additional strength, by which means, as the ogee terminates, in its widest point, at the place occupied by the shoulders, the most room is obtained where the most room is required, without adding to the weight of the casket, or its expense, and this taken in connection with the strength imparted by the overlapping ribs, diminishes the weight at least twenty-five per cent from the square metallic burial-cases now commonly used.”

“A. A. in the drawing, represents the main body, or lower portion of the burial-case, with overlapping ribs b. b., &c., as clearly shown in figure 3; by which construction it will be evident that both lightness and strength are secured. Both ends of the burial-case are constructed in ogee or cyma reversa curves cc—cc, the ogee terminating at its widest point where the shoulders demand the most room.”

“What I claim in my invention, and desire to have secured to me by letters-patent, is, constructing a metallic burial-case with the ogee-shaped ends as described, whereby great reduction in weight, and economy in the manufacture is secured, and at the same time all the space required, afforded.”

"Second, I also claim forming the metallic case, with the overlapping strengthening ribs, as described."

This patent was granted to one A. C. Barstow, April 19, 1859.

T. A. Jenckes, for complainants.

The fact that the reissued patent of March, 1860, is now in the possession of the complainants, and produced in court, is conclusive against the assertion that any surrender and further reissue of it was made during the pendency of this suit.

The presumption in favor of the regularity of the manner of procuring the original and reissued patents, is sufficient to sustain them in the absence of proof against them.

As to the legality of the surrender the reissued patent is sufficient evidence. *Stimpson v. Westchester Railroad Co.*, 4 How. 380; *Battin v. Taggart et al.*, 17 How. 74.

The questions in this case are novelty of the invention and infringement.

Except in mere external resemblance, the mummy cases have no similarity whatever to the Fisk burial-case.

The body is entirely in the part which corresponds to the common coffin; and the carved work representing a relief of the human body is entirely upon the lid.

They are not made in two shells, but as a box with a lid, or rather with two lids or coverings. They are of wood, and not of metal. They are in many pieces, and not in two. They are pervious to air. They are affected by heat and moisture. They furnish no suggestion of the mode of manufacturing a metallic coffin.

The Fahnestock caveat cannot be set up against an independent original inventor, who perfected his invention and obtained his patent, while his unsuccessful experiments were being made. *Curtis on Patents*, §§ 44, 45; *Jones v. Pearse*, Webster's Patent Cases, 124; *Galloway v. Bleaden*, Webster's Patent Cases, 521-526; *Gayler v. Wilder*, 10 How. 477.

Besides, the idea of Fahnestock did not conflict with Fisk's invention.

W. Hayes and *B. T. Eames*, for respondents.

A patent in order to be the foundation of a judgment in an

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action at law, or of a decree in a suit in equity, must be in existence at the time of such judgment or decree. *Moffitt v. Garr et al.*, 1 Black. 273.

The surrender of a patent pursuant to the act of Congress of July 4, 1836, is, in judgment of law, a legal cancellation of the patent. *Moffitt v. Garr et al.*, 1 Black. 273.

The complainants, Raymond & Co., have no interest in the patent of March 6, 1860; the original patent of November 14, 1848, having been surrendered with their consent. *Gibson v. Richards*, C. C. No. Dist. N. Y., Oct. 1845.

The effect of a surrender of a patent is not dependent upon the fact of a subsequent reissue of the patent.

The act of Congress authorizes a reissue only upon a surrender. The surrender must precede in point of time the reissue. Act of Congress, July 4, 1836, § 13.

There was nothing new in the idea of coffins being made of metal.

This is admitted in the original and reissued patent.

The substitution of one material for another is not the subject of a patent. *Hotchkiss et al. v. Greenwood et al.*, 11 How. 248.

There was nothing new in dividing the coffin horizontally, in such a way that each part or shell should hold a portion of the human body.

Coffins were so made by the Egyptians.

A coffin of curvilinear form, having the least possible weight of metal (which must correspond in shape to the human form), could not be used if divided elsewhere than in the widest diameter. In other words, a human body could not be put in a case having an opening smaller than the body.

But it is a practical necessity of the art of moulding, and practised as long as the art itself, to divide curvilinear cast, or raised metallic bodies, longitudinally, in the widest part, or diameter.

A patent cannot be granted merely for a change of form. *Sargent et al. v. Larned et al.*, 2 Cur. 340; *Winans v. Denmead*, 15 How. 341.

Nor is there anything new in the combination or manufacture consisting of a cast or raised air-tight metallic case having a

flanged joint in a plane, and having the least amount of metal requisite to contain the thing enclosed.

Defendants' invention is not an infringement of complainants' patent.

The Barstow casket cannot be made by following the specifications, claim, and drawings of the reissued patent, nor can the Fisk coffin be made by following the specifications, claim, and drawings of the Barstow patent.

CLIFFORD, J. The evidence disclosed in the record does not show that the patent on which the suit was founded ever was surrendered and reissued after the bill of complaint was filed in the case. On the contrary, the proofs are full to the point that the application for surrender and reissue, bearing date on the 13th of November, 1862, never was carried into full effect, but that the application was duly cancelled, and the papers relating to the same were accordingly returned to the applicants. The application for surrender and reissue was unquestionably made by the patentees at the time alleged in the motion; and it is also fully proved that the application was favorably received by the proper officers of the bureau, but it is equally clear that the proceedings were never entirely completed. Authority is given to the commissioner, upon the surrender to him of a patent, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had or shall have a right to claim as new, to cause a new patent to be issued to the inventor, if the error arose by inadvertence or mistake, and without any fraudulent or deceptive intention. 5 Stat. at Large, 122.

The surrender is, undoubtedly, as is contended by the respondents, the act of the party making the application; but it is a mistake to suppose that the application may not be withdrawn, under leave of the commissioner, for good cause shown, at any time before the proceedings are fully completed and duly recorded. The reissued letters-patent, as a general rule, have the effect to supersede the original patent, but a pending application for that purpose cannot receive any such construction, no matter how nearly the proceedings may have approached to a consum-

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mation, so long as they are not finally completed. Prior to the issuing of the new patent, what is called a surrender in the case, is in general nothing more than a preliminary offer to that effect, as the necessary means of obtaining a reissue; and even when not so intended in the outset, it may be subsequently so treated by the commissioner, at the request of the party applying for the reissue. Where bad faith is shown as an element of the case, a different conclusion would doubtless follow; but the withdrawal of the application may be allowed by the commissioner for any reasonable cause, where there is no fraud practised to procure it, and where there is no prejudicial interference with the rights of third persons. Nothing of the kind appears in this case; but the proofs are full and satisfactory that the application was withdrawn and the surrender cancelled, and the money paid as duty, refunded, for good and sufficient reasons, and with the knowledge and consent of the commissioner. The result is, that the motion to dismiss must be overruled.

The record shows that the complainants introduced the reissued letters-patent on which the suit is founded; and the universal rule is, that the letters-patent when in regular form are *prima facie* evidence that the person therein designated as the inventor was the original and first inventor of what is there described as his invention. The statement of the specification is, that metallic coffins have heretofore been made of shapes corresponding to those which are usually constructed of wood, and the representation is, that in consequence of their great weight, and the difficulty of rendering them air-tight, and other objections, they have not been generally used. The principal purpose of the present invention, it is said, is to obviate those objections. The structure of the coffin, as represented in the specification, is made to conform, as nearly as may be, to that of the human body. The preferred mode of accomplishing this object is by constructing the coffin of two shells, an upper and a lower one, of nearly the same depth, which are joined together in a horizontal line at or near the middle point in the height of the coffin. The intimation is given, however, that the place of juncture may be varied to suit the views of the manufacturer, but it is evident that no

very considerable departure from the centre line can be made, without making it necessary to enlarge the size, and consequently to increase the weight of the structure, which, instead of promoting, would defeat one of the purposes of the inventor, as represented in the specification. The object of the inventor in that behalf is to dispense with all unnecessary weight of metal. His statement is, that the two shells are more or less curvilinear in all their parts, and that they may be made as thin as the running of the metal will allow, and still leave them sufficient strength to resist any pressure to which they may be subjected.

Granting that to be so, still, unless the two shells are of nearly equal depth, the receptacle must be larger than the corpse, else there will be difficulty either in depositing the body in the lower shell, or in joining the two shells together, as the one or the other contains the greater portion of the depth. Some variation undoubtedly may be made without any departure from the other conditions of the specification, but the better opinion is that the juncture was, as represented, intended to be substantially at or near the middle line of the structure. The claims of the patent are two, and their true construction leads to the same conclusion in regard to the form and structure of the patented invention.

[Here the court recited the claims above given.]

The upper as well as lower shell constitutes a portion of the receptacle, and in that manner the coffin is approximated more nearly to the human body than could otherwise be done, which also shows that the juncture of the two shells must not vary so much from the centre line of the structure as to render it inconvenient to place the corpse in the intended receptacle, or to create the necessity for enlarging the structure.

The complainants having introduced the reissued patent, the burden of proof is upon the respondents to show that the assignor of the complainants was not the original and first inventor of the improvement. *Stimpson v. West Chester Railroad*, 4 How. 380; *Battin et al. v. Taggart et al.*, 17 How. 74. The respondents admit that the burden is upon them, on this branch of the case, and refer to the evidence in the record to overcome the *prima Facie* case of the complainants. They refer to the mummy-cases

in evidence, proved to have come from the catacombs of Egypt, and insist that those models, if such they may be called, are of a character to supersede the invention described in the bill of complaint. But it is manifest that the proposition cannot be sustained for several reasons, some of which will be mentioned and briefly explained.

First, the structure is of sycamore wood, and not of cast or raised metal, as described in the complainants' patent.

Secondly, the testimony clearly shows that the ancient structure, although it has two parts, corresponds much more nearly to the ordinary wood coffin of the present day than to the patented invention under consideration. The lower part is obviously the receptacle for the corpse, and the upper part is nothing more than an elaborately carved lid or cover. The depth of the lower part is nine or ten inches, whereas the depth of the upper part, even including the carved or raised work, is at most not more than four inches, and at some points is much less. Although the structure has an upper and a lower part, still it is hardly correct to say that it is formed of two shells, for the reason that the lid or cover is in several parts; and also for the reason already given, that the upper part is much more fitly designated as a carved lid or cover than as a shell, to which it bears little or no resemblance. All of the carved work is upon the upper part, which is made to represent a relief of the human body, and it is quite evident that the unusual depth of the part was designed as the foundation for the carved work which it contains, and not as having any necessary connection with the ordinary purpose of a burial-case beyond that of a lid or cover of usual depth. The burial-case exhibited as a sample of those taken from the catacombs is not only made of wood, and not of metal, but it is not in two parts only, as is the invention of the complainants, but in many parts, and unlike that of the complainants, is pervious to air, and is liable to be affected both by heat and moisture. The characteristics of the invention of the complainants are widely different. They may be stated as follows: first, that the structure is composed of two shells, which, when joined together in the manner described, form a receptacle for the human body; second,

that each of the shells encloses a part of the body ; third, that the shells are united by a flange and screws, making the seam air-tight the whole length ; fourth, that the two shells as a whole approximate to the form of the human body, and that the line of their juncture is nearly at the line of the greatest diameter of the body ; fifth, that the structure will have sufficient strength to resist any pressure to which it may be subjected, and yet require less weight of metal than metallic coffins heretofore known and used ; sixth, that it is perfectly air-tight, and not affected by changes of heat or moisture, and consequently is capable of preserving the human body from decomposition for a long time. Such are the principal characteristics claimed for the invention ; and if it be true that they are not all fully realized by it, still it may well be affirmed that, when properly constructed, the invention tends strongly to their accomplishment.

The caveat and application for a patent of A. K. Fahnestock, offered in evidence by the respondents, were not set up in the answer as corresponding inventions to supersede the patent of complainants ; but on the 24th of November, 1862, leave was granted by the court to take testimony upon that subject. Doubts are entertained whether the evidence is properly in the case, as no corresponding amendment has been made in the answer ; but it is unnecessary to place the decision upon that ground, as it is clear that that evidence, if admissible, is wholly insufficient to establish any such defence, because it shows that the caveator and applicant never made any such invention. He, in fact, made no invention, and what he attempted to make was substantially unlike that of the complainants. What he attempted to make was a cast-iron case without any bottom, to be let down over an ordinary coffin after the latter was deposited in the grave. Stress is laid upon the fact that the caveator said that it might be used for a common coffin ; but that expression must be taken in connection with the statement that it was to contain and enclose a common coffin, and to supply the place of a rough coffin, and become a substitute for a brick or stone vault. The applicant himself states in his deposition, that the invention was to take the place of a rough coffin or brick vault, for the

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preservation of the remains of human bodies ; and although there are some statements in the deposition indicating an intention to give the supposed invention a wider range, still it is evident that it cannot in any point of view be regarded as of a character to support this branch of the defence.

A particular examination of the other device introduced by the respondents, as evidence to supersede the patent of the complainants is unnecessary, as it is quite obvious that it cannot have any such effect. The conclusion is, that the assignor of the complainants is the original and first inventor of the improvement described in the reissued patent.

The next issue in the pleadings is that of infringement ; and upon that question the burden of proof is upon the complainants. The respondents admit, that they have been and are manufacturing and selling burial-caskets, constructed according to letters-patent granted to Amos C. Barstow, bearing date on the 19th of April, 1859 ; but they deny that the burial-caskets so manufactured and sold by them constitute any infringement of the reissued patent of the complainants, which is one of the most important questions in the case. The opinion is expressed by experts of skill and experience, that the structure of the respondents is substantially the same manufacture as that described and claimed in the reissued patent on which the suit is founded. The reasons assigned for this opinion are in substance and effect as follows : that the one as much as the other is made of metal ; that in both the coffin is composed of two shells, an upper and a lower one, which meet at a longitudinal point ; that in the one as well as in the other the respective shells constitute a portion of the receptacle of the body which is or is to be contained partly in one shell and partly in the other, and that in both, the adjacent edges or rims of the respective shells have flanges upon them, which are connected together by screws, so that a tight joint can be made at the seam. They also testify, that in both the structures, the two shells are smaller as they recede from their line of juncture, and that they are rounded at the angles, so as to approximate more or less to the form of the cross-section of the body they are designed to contain, and are also made smaller

at the ends than towards the middle, so as also to approximate more or less to the longitudinal form of the body, and to be of less weight than they would be without such approximation. The witnesses show, undoubtedly, that the coffin particularly described and represented in the reissued patent of the complainants, approximates more nearly to the form of the human body than the structure manufactured and sold by the respondents, but the weight of the testimony clearly shows that the difference between the two in that behalf is not a substantial one, but only a matter of degree. Where the patentee is the original inventor of that which is described in his patent as his invention, he has the right to treat as infringers all who make and sell substantially the same thing, even though the infringing machine or structure may be an improvement on the one patented. *McCormick v. Talcott*, 20 How. 405. Whenever the defence set up is that respondent has substantially departed from an existing machine or structure, so as to avoid the consequences of an infringement, he must show or it must appear that the departure is such as involves invention, and not mere mechanical skill. There must be mind and inventive genius involved in it, and not the mere skill of the workman. An improvement of the patented invention of another is not in general a sufficient answer to such a charge; and the defence that the article produced is not as good as the patented article is equally untenable and inadmissible, especially if it appear that it embodies all the peculiarities or characteristics which distinguish the article alleged to be infringed. The article manufactured and sold by the respondents, it is said, is stronger, more spacious, more cumbrous, and more expensive than that produced by the complainants; but the weight of the evidence shows that it embraces all of the principal characteristics claimed in the complainants' patent, and is, therefore, an infringement. The attempt is also made by the respondents to maintain the proposition that the original patent was improperly surrendered, and that the reissued patent on which the suit is founded was procured by the false and fraudulent representations of the present patentees; but the proposition is not supported by the evidence, and therefore cannot be sustained. The

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prima facie presumption is against the proposition, and of course that presumption must prevail in the absence of any controlling evidence in the case.

The validity of the reissued patent is also assailed upon the ground that the commissioner exceeded his jurisdiction in accepting the surrender and granting the reissue. The suggestions in support of the proposition are, that all of the assignees did not apply for the new patent, and that it appears on the face of the specification and claim that it is not for the same invention as that described in the original patent. The first suggestion is entitled to no weight, as the whole title, as shown in the pleadings, was in the applicants. Nonjoinder of licensees constitutes no defence for an infringer at this stage of the litigation. The assignees may tender a surrender and apply for a reissue of the patent; and there is nothing in the pleadings in this case to show that there was any irregularity in the proceedings.

The second suggestion is also untenable, because wholly unfounded in law and fact. The reissued patent is for the same invention as that described in the original specification. An extended examination of this proposition is unnecessary, as it appears, upon a comparison of the specifications in question, that the essential parts of the description in each are substantially in the same language.

The remaining objection is that the description of the invention is not set forth in the patent, in such full, clear, and exact terms, as to enable any one skilled in the art to which it appertains, to construct the patented invention. The settled rule of construction in this country is, that the patent and specification are to be construed together in order to ascertain the subject-matter of the invention. *Cur. on P.* § 121, 155; *Whittemore v. Cutter*, 1 Gall. 429; *Hogg v. Emerson*, 6 How. 479. The drawings also annexed to a specification, in compliance with the statute, are held to form a part of it, and are in like manner to be regarded in the construction of the whole instrument. *Earle v. Sawyer*, 4 Mas. 9.

The specifications are required for two principal purposes: first, to inform the public what the thing is, of which the pat-

entee claims to be the inventor; and, secondly, to enable the public, after the expiration of the patent, to practise the invention from the specification, as therein described. Whether the patentee has described the subject-matter, or what he claims to have invented, so as to enable the public to know what his claim is, is in general a question of law for the court on the construction of the patent. Cur. on P. § 130, p. 130.

But whether he has described the invention in such full, clear, and exact terms as to enable the public to practise it from the specification, is in general a question of fact to be determined in common-law cases by a jury. The act of Congress does not require the patentee to address himself to the uninformed upon the particular subject, but allows him to speak to persons of competent skill in the art; and it only requires him to use such full, clear, and exact terms, as will enable that class of persons to reproduce the thing described, from the description given in the specification. Testing the case by that rule, it is clear that the objection under consideration cannot be sustained, and it is accordingly overruled.

The complainants are entitled to an account.

MASSACHUSETTS DISTRICT.

OCTOBER TERM, 1864.

CHARLES E. DOLE *et al.* v. THE NEW ENGLAND MUTUAL MARINE
INSURANCE COMPANY.

Where a ship was taken and burned by the commander of a rebel privateer, during the late Rebellion, *held*, that the capture was not a taking by pirates or assailing thieves, inasmuch as it appeared that the policy upon the vessel was executed before the Rebellion broke out, and that the commander acted under a commission in due form issued by the government of the rebellious States.

Construed separately from the marginal clause, the terms of the policy would entitle the plaintiff to recover, but the legal effect of the marginal words, "warranted free from capture, seizure, or detention," &c., is, that the insurers are no more liable for a loss occasioned by those perils, than they would have been if the body of the policy had contained no stipulation to that effect, or if the stipulation therein had been that they should not be liable for such losses.

Loss by capture not being included in the policy, it is clear that the plaintiff cannot recover, unless it can be held that the fire, and not the taking of the ship, was the proximate cause of the loss.

Seizure of ships at sea by the ruling power of a country in a time of territorial war is a capture within the meaning of the law of insurance, although the war is waged on one side by a rebel government and people; and it seems also that the word "capture" is sufficiently comprehensive to include a taking by pirates.

When different causes concur in occasioning a loss, the rule is, that the loss must be attributed to the efficient predominating peril, whether that peril was or was not in activity at the final consummation of the disaster.

ACTION of assumpsit on a policy of insurance. Facts agreed. The policy described in the declaration was dated on the 19th of November, 1860, and purported to insure the ship Golden Rocket, for one year, "against the perils of the seas, fire, enemies, pirates, assailing thieves, restraints, and detainments of all kings, princes, and people, of what nation or quality soever, barratry of the master (unless the insured be master of the vessel) and of the mariners, and all other losses and misfortunes which have or shall come to the damage of the said ship, or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston." The stipulation in the policy also was, "that

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in case of capture or detention, the insured shall not have the right to abandon therefor until proof is exhibited of condemnation or of the continuance of the detention (by capture or other arrest) for at least ninety days." There was also an agreement inserted into the policy "that the insurers should not be answerable for any charge, damage, or loss which might arise in consequence of a seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war." The margin of the policy contained the following clause: "Warranted free from capture, seizure, or detention, or the consequences of any attempt thereat, the clause herein embodied touching said perils or adventures to the contrary notwithstanding."

The agreed statement showed that the *Golden Rocket* was an American merchant vessel of six hundred tons' burden, and that she was insured for the sum of \$10,000. It was also agreed that the vessel was in good condition; that she had no armament; and that the ship's company consisted of the master, two mates, and eleven men; that on the 3d of July, 1861, off the Isle of Pines, she met with the *Sumter*, an armed steamer, with the American flag and a pennant set, commanded by Raphael Semmes, a citizen of Maryland, and previously an officer in the United States Navy, but not at that time commissioned or authorized by the government, who, upon the *Golden Rocket's* setting her colors in answer, and while nearly a mile off, fired a shotted gun across her, and then boarded her with an armed boat, and with a force which the officers and crew of the *Golden Rocket* were unable and did not attempt to resist, plundered her of the ship's papers, some sails, spars, provisions, and other articles, took out her officers and crew, and set the ship on fire, by which she was totally destroyed. The interest of the plaintiffs in the vessel, due notice, proof of loss, abandonment, and demand of payment as for a total loss, were admitted.

The plaintiffs insisted that the text of the policy already referred to, had respect chiefly to two classes of marine risks, as appeared from the words of the provision. First, risks of capture or detention arising from acts of government, as shown by the

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words "enemies' restraints, and detentions of all kings, princes, and people of what nation or quality soever," for which, if irregular or unlawful, the citizen may have redress through his own government. Second, such risks as arise from the lawless depredations of individuals, as shown in the policy by the words "pirates and assailing thieves," against which the contract of insurance is the only security. They contended that the marginal clause did not import a warranty, but only that the insurers should not be liable for the losses specified in the clause, just as if such losses had not been included in the body of the policy. Again, they contended that the loss in this case having arisen from a taking by rebels on the high seas, was a loss by pirates or assailing thieves, and not one arising from capture, seizure, or detention, within the meaning of the policy described in the declaration. But if the court ruled otherwise, then they contended that the proximate cause of the loss was not the taking set forth in the agreed statement, but the fire, which, as they insisted, was not "the consequence of any attempt thereat," as described in the marginal clause.

The date of the policy showed that it was executed when the United States were at peace with all the world, and one month before the so-styled Confederate States, or any of them, had made any attempt to secede or withdraw from the Union. When the loss occurred, on the 3d of July, 1861, those States, as the parties agreed, had organized a Confederacy of said States, and a government for the Confederacy, and had established for the same a written constitution. The record also showed that such form of government, was in fact organized in all its departments, legislative, executive, and judicial; that they had raised and organized an army and created a navy; and that on the 6th of May, 1861, a body of persons acting as the Congress of such Confederate States published an act, which they had passed, declaring that war then existed between the Confederate States and the United States, and providing measures for its vigorous prosecution. They had not only made provision for the prosecution of the war, but the agreed statement also showed, that those States at the time of the loss, were carrying on hostilities against the

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United States by land and sea, and had for that purpose an army of over fifty thousand men in the field, and that they had possession of and exercised all the functions of government over all the territory included within the limits of those States, except a few military posts which were held by the military power of the United States. It was also agreed that the Sumter was purchased, armed, equipped, and manned by such Confederate States as and for a public armed vessel, with officers commissioned in due form, and was cruising under a commission from said Confederate States, to attack, capture, or destroy the vessels belonging to the government of the United States or to any citizens thereof, and none other. Furthermore, it was agreed that her commander had a commission as captain in such navy, and was prevented from taking the Golden Rocket into port by the danger and difficulty arising from our blockade; and that whatever was done by the officers and crew of the Sumter was done under the assumed authority of such Confederate States, and for the purpose of prosecuting the war, so declared to exist, and with the sole design and intent of coercing the government of the United States to acknowledge the independence of the Confederate States.

R. H. Dana, Jr., and H. Gray, Jr., for plaintiffs.

The clause in the body of the policy specified two classes of risks:—

First, from acts of governments, “enemies,” “restraints and detainments of all kings, princes, and people, of what nation or quality soever,” for which if irregular or unlawful the citizen may have redress through his own government.

Second, from individual depredation, “pirates and assailing thieves,” against which “assurance is the only security.” The first of these classes would not, the second would, if not specified, be included in “the perils of the sea.” 3 Kent’s Com. (6th ed.) 303; 1 Phil. on Ins. §§ 1106, 1108; Arn. on Ins. §§ 303, 305, 306; M. & P. on Ship. 23, 231, 232; 2 Pars. Mar. Law, 236, 246; *Nesbitt v. Lushington*, 4 T. R. 788; 3 Kent’s Com. (6th ed.) 216, 300; 2 Mol. de Jur. Mar., c. 7, § 14; *Garrison v. Memphis Ins. Co.*, 19 How. 314.

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"Enemies" are evidently governments, vested according to the law of nations and in the view of our own government, with belligerent rights. If "enemies" included those acting under no national authority, the addition of the word "pirates" in the policy would be superfluous.

It is perfectly well settled that the words "arrests, restraints, and detainments of kings, princes, and people, of what nation, condition, or quality soever," extend only to acts of "nations in their collective capacity." *M'Call v. Mar. Ins. Co.*, 8 Cran. 66; *Olivera v. Union Ins. Co.*, 3 Wheat. 189, 190; *Bradlie v. Mary-land Ins. Co.*, 12 Pet. 402; *Gracie v. New York Ins. Co.*, 13 Johns. 170.

The only opinion in favor of a wider signification is in *South Carolina. Simpson v. Charleston Ins. Co.*, Dud. 243.

The clause in the margin of the policy — "warranted free from capture, seizure, or detention, or the consequence of any attempt thereat; the clause herein embodied, touching said perils or adventures, to the contrary notwithstanding" — does not import a "warranty," in the sense of the law of insurance; but only that the insurers shall not be liable for the losses specified in the exception, just as if such losses had not been included in the body of the policy. 1 Phil. on Ins. § 1150.

This clause is to be interpreted with reference to the text of the policy, and, being introduced by the insurers and for their benefit, is in case of doubt to be construed most strongly against them, and so as to give fair effect to the general words of policy. *Yeaton v. Fry*, 5 Cran. 341; *Palmer v. Warren Ins. Co.*, 1 Story, 364; *Blackett v. Royal Exchange Ass. Co.*, 2 C. 251; *Bullen v. Denning*, 5 B. & C. 388; *Western Ins. Co. v. Aber*, 32 Penn. St. 351; *Lawrence v. Aberdeen*, 5 B. & C. 463; *Gabay v. Lloyd*, 3 B. & C. 798; *Suckley v. Delafield*, 2 C. 222; *American Ins. Co. v. Dunham*, 12 Wend. 463; *Caines, Cas. 21*; *Smith v. Delaware Ins. Co.*, 3 S. & R. 59; *Carrington v. del v. Phoenix Ins. Co.*, 4 S. & R. 518, 524.

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The words "capture, seizure, and detention," taken together, and with reference to the body of the policy and the mode of their insertion, are confined to the acts of governments only. They are generally called the "war clause," and have long been in common use. *Green v. Brown*, 2 Stra. 1199; *O'Reilly v. Royal Exchange Ins. Co.*, 4 Campb. 246; *Hahn v. Corbett*, 2 Bing. 205; *McCargo v. New Orleans Ins. Co.*, 10 Rob. (La.) 313.

Even the word "capture," standing alone, though sometimes loosely used to include any forcible taking from without, more appropriately and naturally denotes, and is limited to a capture *jure belli*, whether lawful or unlawful in the particular case, made by a power authorized to wage war. Wheat. on Captures, 52, 54; 1 Hargrave's Collect. Jurid. 137; 1 Park on Ins. 66; 2 Arn. on Ins. 807; 1 Kent's Com. 100, 101; Phil. on Ins. § 1110; 3 Kent's Com. 303.

A taking by pirates has none of the effects of such capture. *Tirrell v. Gage*, 4 Allen, 249; *Barney v. Maryland Ins. Co.*, 5 Har. & Johns. 139; *Williams v. Armroyd*, 7 Cran. 423; *The Nueva Anna*, 6 Wheat. 193; Case of Piracy, 12 Co. 73; *Greenway v. Baker*, Godb. 193; *The Hercules*, 2 Dod. 372; *The Calypso*, 2 Hag. Adm. 213; 1 Phill. Int. Law, 379; 1 Kent's Com. 184.

Seizure, though sometimes applied to any act of seizing, especially when accompanied by "piratical," "mutinous," "barbarous," or other similar adjective, commonly means in a policy of insurance an arrest by act of government, either by municipal law or the law of prize. But when used in connection with capture, as in this marginal clause, it is *ejusdem generis*, though it may include cases in which no condemnation to change the title is looked for. *The Caledonian*, 4 Wheat. 103; *The Apollon*, 9 Wheat. 372; *Carrington v. Merchants' Ins. Co.*, 8 Pet. 518; *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 605; *Higginson v. Pomeroy*, 11 Mass. 110; *Mellish v. Andrews*, 15 East, 15; *The Diligentia*, 1 Dod. 405; *The Amor Parentum*, 1 Rob. A. 303; *The Eagle*, 1 W. Rob. 245; *Lubbock v. Potts*, 7 East, 449; *Black v. Marine Ins. Co.*, 11 Johns. 292; *Jecker v. Montgomery*, 13 How. 515; 2 Arn. on Ins. § 306.

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A taking by rebels on the high seas is a loss by "pirates or assailing thieves," not a "capture, seizure, or detention," within the meaning of this policy. 2 Selden's Works, *Mare Clausum*, c. 10, 1313; Du Cange Gloss. *voce* Pirata; 3 Inst. 113; Co. Lit. 391 a; Calvinus (Lexicon), *voce* Pirata; 1 Hawk. P. C., c. 37, § 4; 1 Russ. on Crimes, 94; 3 Chitty, Crim. Law, 1127; 1 Stat. at Large, 114; *United States v. Palmer*, 3 Wheat. 610; *United States v. Hutchins*, Wh. Cr. Cas. 547; *United States v. Tully*, 1 Gall. 252; *United States v. Clintock*, 5 Wheat. 151; *United States v. Brailsford*, 5 Wheat. 188; 3 Stat. at Large, 600; 1 Kent's Com. 186.

By the laws of England, France, and Holland, as well as our own, a citizen cruising against his own government with an armed vessel under a commission from a foreign state is a pirate. 2 Valin, Ord. de la Marine, 235; Bynkershoek, Qu. Jur. Pub., lib. 1, c. 17; 1 Hume's Crim. Law, 477; *Trial of Golding and Others*, 12 Howell's St. Tri. 1269; 1 Phill. Int. Law, 406; 1 Hawk. P. C., c. 37, § 4; 1 Mol. de Jur. Mar., c. 4, § 24; Evan's case, 2 East, P. C. 798; Prov. Stat. 8 Will. 3; 4 Mass. Col. Rec., Part II. 563; 7 Dane's Abr. 90; Stat. 11 & 12 Will. 3, §§ 1, 14, 15; 2 Chalmers' Opinions, 202, 219, 221; *Trial of Quelch*, 14 Howell's St. Tri. 1067; Const. Mass. (1780), c. 6, § 6; 1 Stat. at Large, 114; 1 Kent's Com. 191; 10 Amer. Jurist, 267.

By the most eminent civilians and writers on the law of nations, piracy is defined to be "the offence of depredating on the high seas without being authorized by any sovereign state or with commissions from different sovereigns at war with each other." Wheat. Int. Law, P. II. 89; Bynkershoek, Qu. Jur. Pub., lib. 1, c. 17; Du Ponceau's Law of War, 127, 128, note; 2 Azuni del Diritto Marittimo, pt. 2, c. 4, art. 7, §§ 2, 5; Casaregis de Commercio, disc. 24, § 25; disc. 64, §§ 4, 5; Mol. de Jur. Mar., c. 4, §§ 18, 20; 2 Browne's Civ. & Adm. Law, 461; Emerigon des Assurances, c. 12, sect. 28, § 1; *Dawson's Trial*, 13 Howell's St. Tri. 454; *Vaughan's Trial*, 13 Howell's St. Tri. 525.

Hostis humani generis is no part of the definition of a pirate, but merely indicative of what is likely to be his character. 1 Phill. Int. Law, 402; *The Serhassen*, 2 W. Rob. 357; *The*

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Malek Adhel, 2 How. 232. See 1 Hume's Crim. Law, 477; 1 Hawk. P. C., c. 37, § 1; 3 Chitty's Crim. Law, 1127; 1 Russ. on Crimes, 100.

Rebels are not entitled by the law of nations to any rights as belligerents against their own country. Klauber, *Droit des Gens*, 235; Gro. de J. B., proleg. 9, § 25; lib. 1, c. 3, arts. 1, 4; lib. 3, c. 3; 2 Ruth. Inst., lib. 2, c. 9, p. 438; Hall, *Int. Law*, c. 14, §§ 9, 25; *Tirrell v. Gage*, 4 Allen, 249; *The Venus*, 8 Cran. 280; 3 Inst. 11; 1 Hale, P. C. 159; *United States v. Chenworth*, C. C. U. S., Ohio, April, 1862.

The manner of the taking of the *Golden Rocket* was piratical; she was taken under false colors; despoiled without being condemned. *The Peacock*, 4 Rob. 187; Halleck's *Int. Law*, c. 16, § 24; *United States v. Klintock*, 5 Wheat. 150; *Jecker v. Montgomery*, 13 How. 516; *The Elsebe*, 5 Rob. 183; 1 Wheat. App. 496; 2 Wheat. App. 2, 3, 81; Halleck on *Int. Law*, c. 30, §§ 5, 28; c. 31, §§ 14, 22; *Del Col v. Arnold*, 3 Dall. 333; 1 Mol. de Jur. Mar., c. 4, §§ 18, 20.

The treasonable intent does not make the act less piratical. 1 Hawk. P. C., c. 29, § 11; *Trial of Woodburne and Coke*, 16 Howell's St. Tri. 81; *Com. v. M'Pike*, 3 Cush. 181; *Com. v. Burke*, 14 Gray, 100; 1 Mol. de Jur. Mar., c. 4, §§ 9, 10.

How can a citizen of the United States, committing acts of hostility upon the high seas against other citizens of the United States, find protection under a commission, from an organization claiming to be an independent government within the territory of the United States, which he is bound to know, and our courts are bound to hold to be illegal? *Church v. Hubbard*, 2 Cran. 236; *Haven v. Foster*, 9 Pick. 130; 4 Bla. Com. 27; *In re Barronet et als.*, 1 El. & Bl. 1; *Rex v. Bailey*, Russ. & R. 1; *The Ann*, 1 Gall. 62; *Fisher v. McGirr*, 1 Gray, 48; *Kelly v. Bemis*, 4 Gray, 88; *Little v. Barreme*, 2 Cran. 179; *Mitchell v. Harmony*, 13 How. 137; *United States v. Jones*, 3 Wash. 220; *Com. v. Blodgett*, 12 Met. 91.

The court must look to the political department, for a rule, upon the effect of the exclusive occupation by the rebels of a part of the dominion of the United States; upon the recognition

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of the rebels as belligerents by Great Britain and France, upon the position of the government towards rebel cruisers. *Gelston v. Hoyt*, 3 Wheat. 324; *Rose v. Himely*, 4 Cran. 241; *United States v. Palmer*, 3 Wheat. 634; *Hardy's Trial*, 24 How. 2 Dod. 360; *Kennett v. Chambers*, 14 How. 38; *The Hercules*, ell's St. Tri. 1371; Halleck's Int. Law, c. 3, § 22; *The Pelican*, Edw. Adm., App. D.; *Dudley v. Folliott*, 3 T. R. 584; *Ogden v. Folliott*, 3 T. R. 726; *Barclay v. Russell*, 3 Ves. Jun. 424; *Dolder v. Huntingfield*, 11 Ves. Jun. 294; *Hogsheads of Sugar v. Boyle*, 9 Cran. 195; *United States v. Hayward*, 2 Gall. 501; *United States v. Rice*, 4 Wheat. 246; *Cross v. Harrison*, 16 How. 191; *Gro. de J. B.*, lib. 8, c. 6, §§ 4-27; *Pufendorf*, lib. 4, c. 9, § 8; lib. 7, c. 7, § 5; lib. 8, c. 11, § 8; *The Dart and The Happy Couple*, cited 1 Edw. Adm. 1; *The Gerasimo*, 11 Moo. P. C. C. 96; *The Hercules*, 2 Dod. 360; *The Lilla*, 25 Law Rep. 89; Proclamations of April 15, 19, 27, May 3, and August 16, 1861, and July 25, 1862; 11 Stat. at Large, 268, 281, 283, 284, 285, 295, 311, 314; President's Messages of July and December, 1861, and December, 1862; Judge Sprague's Charge upon the Law of Piracy, 24 Law Rep. 17, 18; *The Amy Warwick*, 24 Law Rep. 344; *The Lilla*, 25 Law Rep. 89; *Smith's Trial*, C. C. U. S., Penn., October, 1861; *Trial of Savannah Privateersmen*, C. C. U. S., N. Y., October, 1861; Mr. Seward to Mr. Adams, May, 1862; Report of Committee on Commerce of U. S. Senate, June 21, 1862, adopted by the Senate.

This branch of the case stands thus:—

These acts in their physical character are sufficient to constitute piracy.

If not done in acknowledged warfare, these acts are piracy and this not by municipal law of the United States, but by general law of nations.

To take these acts out of the category of piracy, the policy government to which the court looks must have recognized actors as belligerents.

A neutral government, as it claims no sovereign authority, recognizes an insurgent power as belligerent once for all, cases and under all circumstances.

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Not so the sovereign. The object of his war is to enable himself to exercise sovereign power. He never, therefore, intermits that, *de jure*. He never intermits it *de facto*, prospectively, or in all cases and for all purposes. He intermits it only *de facto* in such cases, to such extent, and for such purposes, as policy dictates.

In this case, the acts in question having been committed by and upon citizens of the United States, the contract in suit having been made here between citizens, and the forum being a court of the United States, the only government to which the court can look is the political government of the United States.

The rebels doing these acts cannot be deemed belligerents, unless it be true either, that the government has made a general recognition of belligerent rights in the rebels, or that the government has treated the rebels as belligerents in fact, in any case, or for any purposes, they must as matter of law be adjudged belligerents in all cases and for all purposes.

The first would make the very exercise of belligerent rights by the government deprive it of its rights of sovereignty. The second would transfer the conduct of public policy from the political to the judicial department.

The source of the rebels' commissions is not recognized as sovereign by any nation of the world. The rebels have been recognized as belligerents by two nations only, against the protest of the United States. Those recognitions are conclusive on the courts and citizens of those nations. But on the question of the *status* of citizens, in arms against their government, or the character of their acts, the policy of one or two neutrals cannot furnish the law for a tribunal of this government.

The government of the United States has done no act, amounting to a general recognition of belligerent rights in the rebels. It has protested against such a recognition by neutrals. Its proclamations, before the destruction of the Golden Rocket had declared them to be insurgents, and their cruisers pirates. It has since the taking of the Golden Rocket ordered trials, and allowed a conviction, for piracy, of such cruisers.

The exchange of prisoners, and practice of the usages of civilized warfare, are, on the part of the sovereign, matter of policy

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from day to day, and do not warrant his courts in holding that the rebels have in a court of law the *status* of belligerents. *Vattel*, lib. 3, §§ 294, 295.

If the taking of the *Golden Rocket* was a "capture, seizure, or detention," within the meaning of the exception, still the proximate cause of the loss was not such taking, but the fire, which was not "the consequence of any attempt thereat," but which occurred after the taking was complete, and all the officers and crew had been taken out of her.

If the taking was a "capture, seizure, or detention," it was illegal, and not followed by lawful condemnation, and for each of these reasons did not divest the plaintiffs of their property, nor take away their insurable interest in the ship. 1 *Phil. on Ins.* § 194; 2 *Pars. Mar. Law*, 78, 79, and cases cited.

If this was a belligerent capture, it had not been completed by condemnation, so as to divest the plaintiff's title; if it was a piratical taking, their title, of course, remained good.

The omission of a belligerent captor to send in a prize for adjudication, by reason of the maritime superiority of the enemy, though it may justify the captor and his government in destroying or abandoning her, does not, as between third parties, make the mere taking, equivalent to a condemnation, in changing the title and divesting interest.

No capture or taking is of itself an actual total loss of the ship either in fact, or by the law of insurance, before entire destruction or lawful condemnation. Although it is a constructive total loss which the owners may, by abandoning their interest to the underwriters while the detention continues, make an actual total loss, yet they are not obliged to make an abandonment, but may retain their interest and recover for a total or partial loss, according to the injury actually proved. 2 *Phil. on Ins.* § 1493; 2 *Arn. on Ins.* 998.

Fire is a distinct risk, to which the underwriters remain liable while exempt from losses for other perils, although such other perils have exposed the ship to the loss by fire. *Garrison v. Memphis Ins. Co.*, 19 *How.* 314; *Airey v. Merrill*, 2 *Cur.* 11; *Pelly v. Royal Ex. As. Co.*, 1 *Burr.* 341; *Emerigon des Assu-*

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rances, c. 12, sect. 17, § 1 ; *Patapsco Ins. Co. v. Coulter*, 3 Pet. 236.

The fire not having been a means used in attempting to take or actually taking possession of the ship, but having occurred after the taking was complete, and after her assailants had obtained undisputed possession of her, and taken out her officers and crew, was the proximate and efficient, and by law the sole cause of the loss, according to the familiar maxim, *causa proxima non remota spectatur*. *Gordon v. Rimmington*, 1 Campb. 123 ; *Jones v. Schmoll*, 1 T. R. 130, n. ; *Forster v. Christie*, 11 East, 209 ; *Rice v. Homer*, 12 Mass. 234 ; *Livie v. Janson*, 12 East, 648 ; *Hodgson v. Malcolm*, 2 N. R. 340 ; *Redman v. Wilson*, 14 M. & W. 476 ; *Ionides v. Universal Ins. Co.*, 8 Law T. N. S. 705 ; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 219 ; *Lovering v. Mercantile Ins. Co.*, 12 Pick. 369.

To sum up the whole matter, the plaintiffs contend : —

1. The loss was by “pirates and assailing thieves,” within the terms of the policy ; and therefore total, as soon as the ship was taken.

2. The case is not within the excepted risks, in the margin, of “capture, seizure, detention, or the consequences of any attempt thereat.”

3. If this taking was a loss within the exception, it was not total without condemnation, or continuance of the detention for ninety days ; and, before either of those contingencies happened, she was totally lost by fire, a distinct peril, for which the insurers are liable.

4. If the defendants are neither liable for the loss of the ship by fire, or not liable for her loss at all, they are liable, as under a loss by “pirates and assailing thieves,” for the tackle, apparel, and other articles of which the Sumter's men plundered the ship, and which they took no steps to have condemned. Phil. on Ins. §§ 463, 1223.

B. R. Curtis and *J. J. Storrow*, for defendants.

This was not a loss by “pirates,” within the meaning of these policies.

The word “pirates” may be used to designate either of two

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distinct classes of persons: the first being those deemed pirates by the law of nations; the second, those required by the municipal law of some particular country, to be adjudged to be pirates for the purposes of criminal procedure and punishment. App. 5 Wheat. 8; *United States v. Smith*, 5 Wheat. 153; 3 Stat. at Large, 513; 1 Stat. at Large, 114; *United States v. Pirates*, 5 Wheat. 196; *The Antelope*, 10 Wheat. 122; 1 Kent's Com. 186; 7 Dane's Abridgment, 94; Bynk. Jus. Priv., lib. 1, cap. 117; *Le Louis*, 2 Dod. 244.

These policies use the word "pirates" in that simple and ordinary sense in which it now is and immemorially has been known to the general commercial law of the civilized world; and not to describe offenders against some municipal criminal law, of some particular country.

The peril of pirates was to be encountered on the high seas, where the common law of nations prevails, and declares who are "pirates."

The sole office of these municipal laws is to prescribe criminal procedure and punishment in certain cases which are not piracy, as if they had been piracies. But a policy of insurance has no connection with criminal procedure, or the punishment of offenders. *United States v. Pirates*, 5 Wheat. 196.

The interpretation and effect of policies of insurance belong to another system of law, existing before these statutes were passed, and not intended to be affected by them. This system of law is not merely a branch, or division of municipal law; but belongs to and is part of the common law of nations which defines piracy. 1 Marshall on Ins. 19; 1 Duer on Ins. 2; *Warren v. The Man. Ins. Co.*, 13 Pick. 518; *Deshon v. The Mer. Ins. Co.*, 11 Met. 199; *The Malek Adhel*, 2 How. 232; *The Antelope*, 10 Wheat. 122; 3 Kent's Com. 342, 343; 1 Phil. on Ins. (Preface) 7, *ad fin.* and 77; 1 Arn. on Ins. 12, and citations *passim*; *United States v. Smith*, 5 Wheat. 162.

Policies of insurance have no reference to the legality of governments; they refer always to *de facto* authority, of kings, princes, and people; and an interpretation which should make a risk depend on the legality of an actual government, under whose

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authority the property had been captured, seized, or detained, would be unprecedented and dangerous. *Nesbitt v. Lushington*, 4 T. R. 783.

The acts of the *Sumter* were not the acts of pirates under the law of nations. 1 Kent's Com. 183; Warburton's Rep. 368-376; App. 5 Wheat. 8; *United States v. Smith*, 5 Wheat. 153, and note; *United States v. Pirates*, 5 Wheat. 196; *The Malek Adhel*, 2 How. 211; *The Seal-skins*, 2 Paine, 333; 1 Lemonier on Ins. 251.

The facts find the existence of a commission, and that the capture was made in pursuance of it.

They find that the commission was to cruise against the commerce and property of the United States and of its citizens only.

The executive government of the United States has by public proclamations and messages to Congress, and in other appropriate public documents, recognized and affirmed the existence of open and public war existing between the United States and a *de facto* government of the so-called Confederate States. The President's Proclamation of April 19, 1861; The President's Reply to the Virginia Commissioners; The President's Proclamation of April 27, 1861; The President's Message to Congress, July 4, 1861; The President's Proclamation of August 12, 1861; The President's Proclamation of August 16, 1861.

The United States has, in respect to the government and people of the so-called Confederate States, both sovereign and municipal rights; under the first they wage war; under the second they hold all persons, property, and acts subject to constitutional criminal laws of Congress. *Rose v. Himely*, 4 Cran. 272; Halleck's Int. Law, 344.

But the existence of these laws of Congress and the illegality of the acts of the Confederate States and their people, when tested by them, can have no bearing on the question whether the law of nations has been infringed. *The Antelope*, 10 Wheat. 122; 1 Stat. at Large, 114.

And the United States cannot at the same time insist that they have the belligerent rights which by the law of na-

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tions belong to a sovereign waging public war, and yet assert that there is no such public war as is known to the law of nations.

That it is a civil war does not change the rule of the law of nations respecting those who carry it on.

Modern writers, and the settled usage of civilized states, including the United States, and the repeated decisions of their highest court, allow to each party in a civil war full participation in the rights of war; and among others, the right to cruise on the high seas against the commerce and property of its enemy. Vattel (Chitty's ed.), 424; Wheat. Int. Law, Pt. II., c. 11, § 15; Halleck's Int. Law, 333; *The Santissima Trinidad*, 7 Wheat. 283; *United States v. Palmer*, 3 Wheat. 610; *The Neustra Senora*, 4 Wheat. 497.

The fact that it is a civil war, and a rebellion against the lawful government of the United States, renders a commission to cruise against the commerce of the United States, derived from the Confederate government, utterly void as an answer to an indictment for an offence against municipal criminal law; but the existence of such an authority, from such a government, prevents those acting under it from being pirates, under the law of nations.

The warranty by the assured, against "capture, seizure, and detention," and the consequences thereof, takes this loss out of the policy.

Any capture or seizure, whether rightful or wrongful, and whether made under a commission from a *de jure*, or *de facto* government, or made by mere pirates, is equally within this warranty. 2 Marshall on Ins. 422; 1 Phil. on Ins. 1110; Emerigon des Assurances, c. 12, sect. 18, § 1; 3 Kent's Com. 304; Pot on Ins., No. 54; Valin's Com., art. 26, 46; 2 Boulay-Pat § 16, p. 102; *Goss v. Withers*, 2 Burr. 694; *Powell v. Hy* 5 El. & Bl. 607; *Kleinwort v. Shepard*, 1 El. & El. 447; C. 32 Law T. 313; *McCargo v. Mer. Ins. Co.* 10 Rob. (La.) 334, (La.) 202; *McCargo v. Mer. Ins. Co.* 10 Rob. (La.) 334, *Tirrell v. Gage*, 4 Allen, 245; *Lee v. Boardman*, 3 Mass. Abb. on Ship. 33; Halleck's Int. Law, c. 12, § 1

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Kent's Com. 108; 2 Woddeson's Lec. 255; 2 Arn. on Ins. 813, 1115-1117; *The Hercules*, 2 Dod. 359; *The Helena*, 4 Rob. 5; *The Dickenson*, 1 Hay & Mar. 46; *Nesbitt v. Lushington*, 4 T. R. 787; *Naylor v. Palmer*, 8 Exchq. 739; *Mellish v. Andrews*, 15 East, 15; *United States v. Klintock*, 5 Wheat. 150; *Davison v. Seal-skins*, 2 Paine, 333; *Parsons v. Mass. F. & Mar. Ins. Co.*, 6 Mass. 208; *The Wanderer*, 1 Sprague's Dec. 521.

The 3d section of the Act of March 3, 1819, enacted by the Congress of the United States, reads as follows:—

“And be it further enacted, that the commander and crew of any merchant vessel of the United States, owned wholly or in part by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel owned as aforesaid, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States; and may subdue and capture the same,” &c.

By section 2, the President is authorized to cause to be subdued, &c., any armed vessel “which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure.” 3 Stat. at Large, 513.

By a Massachusetts Colony law of 1673, piracy in harbors or at sea by piratically seizing a vessel, &c., was punished with death. 4 Mass. Col. Rec., Part II., 567; 7 Dane's Abr. 90. See *The Malek Adhel*, 2 How. 233; *Josefa Segunda*, 5 Wheat. 338, 353, 357; *Dias v. The Revenge*, 3 Wash. 272; *United States v. Jones*, 3 Wash. 209; Holt on Ship. 191.

It has been suggested by the plaintiffs, that the *de facto* Confederate States occupy the same position towards the United States, that the latter occupied towards Great Britain in our war of the Revolution, and that our courts are to take the same view of questions growing out of the contest that the English courts then took of similar questions. During that war we find that the most eminent English jurist was accustomed to use the word “capture” to describe the acts of American privateers. *Miles v.*

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Fletcher, 1 Doug. 231. See Miller on Ins. 299; *Tyrie v. Fletcher*, 2 Cowp. 666.

Judge Nelson, in his charge to the jury upon the trial of the crew of the *Savannah*, gave the following definition of a pirate:—

“A pirate is said to be one who roves the sea in an armed vessel, without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force, and appropriating to himself, without discrimination, every vessel he may meet.”

There was no loss by fire within the meaning of the policy.

The hostile acts of the officers and crew of the *Sumter* were the efficient and prevailing cause of the loss and destruction of the vessel, and those acts were put at the risk of the owner by the marginal clauses, which warrant the insurer against loss or expense arising from capture.

The taking and the burning were parts of one and the same act of hostility; to attempt to separate them and consider them as distinct, independent, and unconnected perils or causes of loss, is a metaphysical refinement and subtlety which is contrary to the obvious truth of the case, and therefore has no place in the law of insurance.

The rule, *causa proxima non remota spectatur*, does not refer to the cause nearest in point of time, but to that which is most nearly and essentially connected with the loss as its efficient cause. *Vos v. United Ins. Co.*, 2 Johns. Cas. 180; *Suckley v. Delafield*, 2 Caines, 222; *American Ins. Co. v. Dunham*, 12 Wend. 463; *Havelock v. Hancill*, 3 T. R. 277; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 219; *Grim v. Phoenix Ins. Co.*, 13 Johns. 451; *Montoya v. London Ass. Co.*, 4 Eng. L. & Eq. 500; *Magoun v. N. E. Ins. Co.*, 1 Story, 157; *Savage v. Pleasants*, 5 Binn. 403; *Coolidge v. N. Y. Firemen Ins. Co.*, 14 Johns. 308.

These cases, and all the cases above cited, are put upon the ground, that all the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself; that a loss which may fairly be considered

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to be exclusively and solely occasioned by a peril insured against, without regard to distance of time, is a loss by that peril; that the loss is to be attributed to the efficient, predominating, operative peril. See particularly *Waters v. Mer. Louisville Ins. Co.*, 11 Pet. 219; *Magoun v. N. E. Ins. Co.*, 1 Story, 157; Phil. on Ins. § 1115, p. 669, § 1132; *Peters v. Warren Ins. Co.*, 14 Pet. 108; *Montoya v. London Ass. Co.*, 4 Eng. L. & Eq. 500; *McCargo v. Ins. Co.*, 10 Rob. (La.) 327, 328; *Lawrence v. Aberdeen*, 5 B. & A. 138.

It would be a mere metaphysical nicety to hold otherwise, and the law, as a practical science, does not indulge in such niceties; the law of insurance, like all commercial law, requires the application of sound common sense and practical reasoning, for it deals with the business and interests of common men, who are unused to deal with abstractions and refined distinctions. It has become a practical and convenient system, because it studiously avoids subtle and refined reasoning, however logical it may seem, and has guided itself by safe practical rules. *Magoun v. N. E. Ins. Co.*, 1 Story, 157; *Peters v. Warren Ins. Co.*, 14 Pet. 108; *Gen. Ins. Co. v. Sherwood*, 14 How. 363; *Rhineland v. Ins. Co.*, 4 Cran. 29.

The cases claimed as giving countenance, in this part of the case, to the theory of plaintiffs, resolve themselves into these classes:—

Cases where, after one peril has ceased to act, another independent and distinct peril, having no necessary or natural connection with the first, supervenes and causes the loss; in these, though the property might not have been exposed to the second peril, or might not have been so injuriously affected by it, without the concurrence of the first, the second is deemed in law to be, as it is in fact, the cause of the loss. See *Jones v. Schmoll*, 1 T. R. 130, n.; *Delano v. Bedford Ins. Co.*, 10 Mass. 353; *Lau v. Goddard*, 12 Mass. 113; *Livie v. Janson*, 12 East, 653; *Rice v. Homer*, 12 Mass. 234; *Foster v. Christie*, 11 East, 205.

Another class embraces cases, where the underwriters have alleged that the negligence of the agents or servants of the assured, not amounting to barratry, led or contributed to the loss.

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Formerly it was held that the assured should not recover for losses to which his own negligence or that of those under his control had contributed. *Gen. Ins. Co. v. Sherwood*, 14 How. 364.

There are some that turn on a question of pleading. *Hagedorn v. Whitmore*, 1 Stark. 157; *Gordon v. Rimmington*, 1 Campb. 123.

The opinion of the Supreme Court of Massachusetts in this case furnishes a conclusive answer to the plaintiff's claim and argument on this point. *Dole v. N. E. Mut. M. Ins. Co.*, 6 Allen, 395.

CLIFFORD, J. The defendants contend that the loss in this case, under the circumstances disclosed in the agreed statement, was not a loss by pirates within the meaning of the policy as understood in the law of insurance.

The theory of the defendants is, that the word "pirates" is used in the policy in the ordinary sense in which it is understood in the general commercial law of the civilized world; and they accordingly contend that the acts of the Sumter in taking the ship, having been committed when she was engaged in open and actual war, under a commission issued by a *de facto* government, as shown in the agreed statement, were not the acts of pirates, as assumed by the plaintiffs, but were the acts of persons having under the law of nations certain limited and qualified belligerent rights.

In the third place, they contend that the warranty in the marginal clause, against capture, seizure, and detention, or the consequences of any attempt thereat, takes the loss in this case out of the policy, and that any capture or seizure, whether rightful or wrongful, and whether made under a commission from a *de jure* or *de facto* government, or made by mere pirates, is equally within that provision.

Finally, they contend that the acts of the Sumter in taking the ship were the efficient and prevailing cause of the loss and destruction of the vessel, and that those acts were expressly put at the risk of the owner by the marginal clause.

The effect of the first proposition submitted by the plaintiffs, if

admitted to be correct in its full extent, is the same as that of the third ; and the two, therefore, in their application to this case, may be regarded as identical. Authorities cited by the plaintiffs in support of their first proposition show that the words " arrests, restraints, and detainments of kings, princes, and people, of what nation or quality soever," as a general rule, apply only to the acts of nations in their collective capacity ; but they leave the question, whether the same rule shall be applied to the words " capture " and " seizure," quite undetermined, which is the question in this case. Stipulations of indemnity against takings at sea, arrests, restraints, and detainments of all kings, princes, and people, says Chancellor Kent, refer only to the acts of governments for government purposes, whether right or wrong ; but the same learned author says that every species of capture, whether lawful or unlawful, and whether by friends or enemies, is also a loss within the policy. 3 Kent's Com. 303. Speaking of the clause under consideration, Mr. Phillips says it is more generally understood to apply to captures, seizures, and detentions by the commissioned officers and agents of some lawful and acknowledged government, but he admits in the same section, that the word " capture " is of itself broad enough to comprehend any forcible seizure or arrest which may occasion a loss to the insured. 1 Phil. on Ins. (4th ed.) § 1110, p. 664. Capture, properly so called, says Arnould, is a taking by the enemy, as prize in time of open war, or by way of reprisals, and with intent to deprive the owner of all dominion or right of property over the thing taken ; and no doubt is entertained that the word in legal acceptation is used in that sense more frequently than in any other. But the same author admits that the legality or illegality of the taking does not affect the liability of the underwriter as against the assured ; and such, it is believed, is the well-settled law upon the subject. Whether lawful or unlawful, or however made, capture, when the proximate cause of the loss, renders the underwriter liable under a policy against such a loss, though other causes may have contributed to the result. 2 Arn. on Ins. § 303, p. 808. When a vessel previously forced by stress of weather to put into a port of distress was violently boarded by a mob,

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who took the control of her from the master and crew, and ran her on a reef of rocks, whereby the cargo was damaged, and then forced the master to sell the cargo at a low price, Lord Kenyon held that the loss fell within a capture by pirates, and consequently that the assured might have recovered under a count so alleging it, had not the underwriters been exempted by the memorandum, from all average loss. *Nesbitt v. Lushington*, 4 T. R. 787; 2 Arn. on Ins., § 306, p. 817. The usual phrase, "against all captures at sea, or arrests, restraints, or detentions of all kings, princes, or people," says Mr. Parsons, "covers captures, detentions, or arrests by public enemies, by belligerents, or in certain cases by the government of which the assured is himself a subject"; but he does not say that it does not also cover takings by pirates. 2 Pars. Mar. Law, 246. The remaining authority cited by the plaintiffs in support of their first proposition approaches more nearly to their views. *Maude & P. on Ship*. 232. Pirates, say those writers, are considered *hostes humani generis*, and therefore are never recognized as enemies, nor are they included in the expression "kings, princes, and people." Referring to that entire phrase, they remark that the words are properly applicable only to the ruling power of a country, and not to pirates or any other lawless power; but the only authority cited in support of the latter branch of the proposition is the case of *Nesbitt v. Lushington*, 4 T. R. 787, which is rather the other way. Plainly, therefore, the authorities cited are not sufficient to establish the proposition that the word "capture" is not broad enough to include the taking in this case; but the point will be further considered in examining the third proposition submitted by the plaintiffs.

The marginal clause, it is contended by the plaintiffs, is not a warranty in the sense in which that word is usually known and understood in the law of marine insurance. The general rule is that any statement of a fact in the policy is a warranty of that fact though neither the word "warrant," nor any formal expression of like import is used. Such a formal expression is not in general requisite to constitute a warranty, as has been held in repeated cases. On the other hand, it is equally clear that it

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is frequently a warranty in form of expression, inserted in the policy or in the margin, where such is not the intention of the parties, and where there is none in fact. 2 Phil. on Ins. (4th ed.) § 760, p. 428. The instance put by Mr. Phillips is where the assured warrants the property free from average detention or capture, or from other losses or perils, which he well says is no more than an agreement that those shall not be among the perils and losses insured against, and for which the underwriter is to be liable. *Palmer v. Warren Ins. Co.*, 1 Story, 360. *Martin v. Fishing Ins. Co.*, 20 Pick. 389. The legal construction of the clause is that the underwriter is liable for the direct effects of the perils insured against, while the assured stipulates to bear the direct effect of those perils which are excepted. 1 Phil. on Ins. (4th ed.) § 2151, p. 708; *McCargo v. New Orleans Ins. Co.*, 10 Rob. (La.) 313. Granting the correctness of the proposition, it is not perceived that it affords much assistance in disposing of the controversy, because the other questions remain to be determined.

The third proposition of plaintiffs is, that the loss in this case having arisen from a taking by rebels on the high seas is a loss by pirates, and not one arising from capture or seizure within the meaning of the policy. Obviously, there are two questions involved in the proposition, and it may well be admitted that they are important, and that neither is unattended with difficulty. They are as follows: 1. Whether the acts of the officers and crew of the *Sumter* in the taking the ship under the circumstances set forth in the agreed statement were piratical acts within the meaning of the policy; and if so, then, 2. Whether the meaning of the words "capture or seizure" is or is not broad enough to include the taking by pirates. Standard writers upon criminal law in defining piracy say it "consists in committing those acts of robbery and depredation upon the high seas which, if committed on land, would have there amounted to felony." 1 Russ. on C. & M., by Shars. 94; 2 Whar. Cr. Law (5th ed.), § 2830, p. 541; 4 Bla. Com. 72; 2 East, P. O. 796; 1 Hawk. P. C., c. 37, § 4.

Punishment of death is denounced against any person, by the

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act of Congress of the 3d of March, 1819, who shall, upon the high seas, commit the crime of piracy as defined by the law of nations. 3 Stat. at Large, 513. The Supreme Court held, in the case of an indictment under the fifth section of that act, that the definition given of piracy was a constitutional one, and that the crime was defined by the writers on the law of nations with reasonable certainty. *United States v. Smith*, 5 Wheat. 159. All writers, say the court, in that case, concur in holding that robbery or forcible depredation upon the sea, *animo furandi*, is piracy. Judge Story gave the opinion in that case, and he proceeds to say that the same doctrine is held by all the great writers on maritime law in terms that admit of no reasonable doubt; and he further shows that the common law, as it existed at the date of the Revolution, recognized and punished piracy as an offence not against its own municipal code, but as an offence against the law of nations, which is a part of the common law. Until the statute of 28 Henry VIII., c. 15, piracy was punishable in the parent country, only in the admiralty as a civil-law offence; and it is well-settled law that that statute, in changing the jurisdiction to the courts of common law, made no change in the nature of the offence. Robbery on the high seas, say the same court in *United States v. Pirates*, 5 Wheat. 197, is considered as an offence within the criminal jurisdiction of all nations. The reason of the rule undoubtedly is, that it is an offence against all nations, and consequently is punishable by all; and there can be no doubt that the plea of *autre fois acquit* is a good plea in any civilized nation, though resting on a prosecution instituted in the courts of a foreign jurisdiction. Modern writers also, upon the law of nations, maintain the same views. Piracy is robbery, says Chancellor Kent, or a forcible depredation on the high seas without lawful authority, when done *animo furandi*, and in the spirit and intention of universal hostility. His definition is that it is the same offence at sea as robbery on land; and he remarks that all writers on the law of nations and on the maritime law agree in that definition. Every nation has a right to attack and exterminate pirates without any declaration of war; and the universal rule is that they acquire no rights by capture, but that

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true owner may reclaim his property wherever it may be found. 1 Kent's Com. 184. Another modern writer upon international law says piracy is a crime not against any particular state, but against all states and the established order of the world. Woolsey on Int. Law, § 137, p. 232. The same learned author defines piracy as robbery on the sea or by descent from the sea upon the coast, as committed by persons not holding a commission from or at the time pertaining to any established state. He mentions three classes of persons whose depredations upon the sea amount to the crime under consideration: 1. Depredations of persons who form an organization for the purposes of such plunder, but who, inasmuch as such a body is not constituted for political purposes, cannot be said to be a body politic; 2. Acts of persons who having, in defiance of law, seized possession of a chartered vessel, use it for the purpose of robbery; 3. Similar acts of persons who have taken and hold commissions from two belligerent adversaries. Such a crime being one committed against all nations, may be brought before the proper tribunal of any civilized nation, no matter what may be the nationality of the prosecutor or what may be the origin or domicile of the person committing the offence. The legislative authority of a state may doubtless enlarge the definition of the crime of piracy, but the state must confine the operation of the new definition to its own citizens and to foreigners on its own vessels. Two states also may agree by treaty to regard as piracy a particular crime which is not so defined in the international code, and the stipulation will be obligatory upon the contracting parties. The effect of such a treaty is in general to give to both the contracting parties jurisdiction over that offence for the trial and punishment of such of the citizens of the two countries as commit the offence, but the operation of such a treaty has no bearing on other nations. Woolsey on Int. Law, § 137, p. 232.

Actual robbery on the high seas is piracy under the law of nations by all the authorities, and so also is the act of cruising upon the high seas without a commission and with the intent to rob, especially if the charge be accompanied by proof of unsuccessful attempts about the same time to commit the primary

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offence. Such robbery is piracy, because the criminal act is committed against all nations, and therefore is punishable by all. Undoubtedly a statute may declare any offence piracy committed within the jurisdiction of the nation passing the statute, and such offence will be punishable by that nation as an offence against the municipal authority. But piracy under the law of nations, which alone is punishable by all nations, can only consist in an act which is an offence against all. No particular nation can increase or diminish the list of offences thus punishable. App. to 5 Wheat. 8; per Marshall, Ch. J. The offence of piracy at common law, says Mr. Roscoe, is nothing more than robbery upon the high seas; but by statutes passed at various times, and still in force, many artificial offences have been created which are to be deemed to amount to piracy, and the remark is undeniably correct, if applied exclusively to the municipal law of the nation where such statutes were passed and are in force. Ros. Crim. Ev. by Shars. 832; *United States v. Palmer*, 3 Wheat. 626. The controlling purpose of such municipal laws is to denounce certain acts as piracy not before known as such, and to make provision for the trial and punishment of such offenders, as if the acts committed were piracy at common law.

Offenders against such laws, if citizens or subjects of the nation passing the laws, are justly amenable to their penalties as violators of the municipal law of the nation. Text-writers, says Mr. Wheaton, define piracy as "the offence of depredating on the seas without being authorized by any sovereign state or from commissions from different sovereigns at war with each other." Wheat. on Int. Law, by Lawrence (2d ed.), 246. The annotator shows conclusively that in applying the term "piracy" regard has not always been had to the distinction between the offence as known in the law of nations, which is justiciable everywhere, and certain offences created by the statutes of particular nations, for which the same nomenclature has been arbitrarily adopted, but which are only cognizable before the municipal tribunals of such nations having jurisdiction either territorial, actual, or implied, or over the person of the offender. Same, 247. The proposition that pirates are the common enemies of all mankind must

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be confined to piracy as defined by the law of nations, and cannot be extended to offences which are made piracy by municipal legislation. The former offence may be tried and punished in the courts of justice of any nation by whomsoever and wheresoever committed; but piracy created by municipal statute can only be tried by that state within whose territorial jurisdiction, on board of whose vessels, the offence thus created was committed. Same, 256; *United States v. Klintock*, 5 Wheat. 144. Similar views also are expressed by Mr. Phillimore in his very learned commentaries upon international law. He says piracy is an assault upon vessels navigating the high seas, committed *animo furandi*, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury. Courts of all nations have jurisdiction of the offence, or in other words, the pirate is "justiciable everywhere"; and the learned commentator remarks, that the detestable occupation of the pirate has made him *hostis humani generis*, and that he cannot upon any ground claim immunity from the tribunal of his captor. 1 Phill. on Int. Law, 379. Contracts of marine insurance, however, have in general no connection with criminal procedure, or with the laws of a state making provision for the punishment of offenders. The interpretation and effect of marine policies of insurance must be governed by the rules of the commercial law, which is a system of law known to all nations, and which in general is wholly unaffected by the criminal law of any particular country. *Warren v. Manuf. Ins. Co.*, 13 Pick. 518; *Deshon v. The Mer. Ins. Co.*, 11 Met. 199. Treating of marine insurance, a learned commentator says that maritime law in general partakes more of the character of international law than any other branch of jurisprudence; and the reason assigned for the conclusion is, that it pervades everywhere the institutions of that vast combination of civilized nations, which constitute one community for commercial purposes and social intercourse. 3 Kent's Com. 342; *The Antelope*, 10 Wheat. 122. No branch of the law, says Mr. Phillips, can more properly be denominated a science than insurance; and he holds in effect that the decisions of the courts of other countries, and the opinions and

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reasons of foreign writers upon the subject are equally applicable to it with those of our own courts, because the contract is everywhere known and is substantially the same throughout the civilized world. Phil. on Ins. (Pref.) vii. ; *The Malek Adhel*, 2 How. 233 ; *United States v. Smith*, 5 Wheat. 162.

The defendants insist that a capture made under a commission to cruise against its enemies, and its enemies only, issued under a regularly organized *de facto* government, engaged in open and actual war, is not piracy under the law of nations. But they do not controvert the fact that such a commission, derived from the Confederate States under the circumstances disclosed in the agreed statement, would be utterly null and void as an answer to an indictment for an offence against our municipal criminal law. Such a proposition, if submitted, could not, in the judgment of this court, be maintained for a moment, as it would involve the question whether those States had a right to secede. They had no such right express or implied. Secession is a wicked heresy, which has no foundation whatever in the Federal Constitution. Nothing of the kind is pretended by the defendants ; but what they contend is, that the exercise of such an assumed authority under such a government as that disclosed in the agreed statement, prevents those acting under it from being pirates under the law of nations. The commission in this case was to attack, capture, or destroy American vessels, and none others ; and the agreed statement shows that the attack, capture, and destruction of the ship was by the described persons, acting by virtue of such commission, and under the assumed authority of such Confederate States. The concession of the defendants is, that the facts stated would constitute no defence to an indictment alleging an offence against our municipal criminal law ; and they also concede affirmatively that the United States have, in respect to the government and people of the so-called Confederate States, sovereign as well as municipal rights ; that under the first they may wage war to suppress the rebellion, and that under the second they may hold persons engaged in it subject to the criminal laws of the United States. *Rose v. Himely*, 4 Cran. 272 ; Halleck on Int. Law, 344. Granting all this, still they insist that

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the existence of such criminal laws, and the illegality of the acts of the Confederate States and people, when tested by such laws, have no bearing whatever on the question, whether in the case under consideration the law of nations has been infringed. *The Antelope*, 10 Wheat. 122; *The Marianna Flora*, 11 Wheat. 1. Such a question came before the Supreme Court under the following circumstances. *United States v. Klintock*, 5 Wheat. 151. The statement of the case shows that in the trial of an indictment for piracy, it appeared that the defendant had been cruising on the high seas under a commission from a person having no authority to issue commissions for the capture of vessels at sea; that the defendant, as first lieutenant of the vessel in which he sailed, aided in capturing the vessel described in the indictment. The defence, among other things, was that the acts proved did not amount to piracy, because the defendant had acted in good faith under the commission. The answer of Marshall, Ch. J., to that proposition deserves consideration. He said whether a person acting in good faith under such a commission may or may not be guilty of piracy, we are all of the opinion that the commission can be no justification of the facts stated in this case. The decision turned wholly on the fact stated by the court, that the whole transaction, taken together, demonstrated that the vessel had not been captured *jure belli*, but was seized and carried into port *animo furandi*; that it was not a belligerent capture, but a robbery on the high seas, which, by all the authorities, is piracy under the law of nations. Unlike what was stated in that case, the agreed statement in this case shows that the capture of the ship was for the purpose of prosecuting said war so declared to exist, and with the sole purpose and intent of coercing the government of the United States, as before explained.

The policy in this case was executed, and the contract was completed, as the parties agree, previous to the President's proclamation establishing the existing blockade; and it also appears that since the beginning of hostilities our public armed ships have claimed and exercised the right to visit neutral ships on the ocean, and that many such have been captured, and with their cargoes condemned for having contraband of war on board des-

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tined to some port in the control of the rebels. Property also belonging to persons resident in any place in the possession and control of the rebels, and found on the high seas, has been, pursuant to the orders of the President, captured and condemned as lawful prize of war, upon the ground that it was enemies' property. Looking at the whole case, it is evident that the question under consideration has been fully settled by the Supreme Court. *The Bark Amy Warwick*, 2 Black. 665. Neutrals, say the court in that case, have a right to challenge the existence of a blockade, *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion for the purpose of subduing the enemy.

Right of prize and capture has its origin, say the court, in the *jus belli*, and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties *belligerent* to use this mode of coercion against property or territory in possession of the other. Parties belligerent in a public war are independent nations. But it is not necessary to constitute war, say the court, that both parties should be acknowledged as independent nations or sovereign states; and the court added that a war may exist where one of the belligerents claims sovereign rights against the other. "When the party" in a civil war "occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war." They claim to be in arms to establish their liberty and independence in order to become a sovereign state, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason. Parties to a civil war, say the court, usually concede to each other belligerent rights. They

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exchange prisoners, and adopt the other customs and rules common to public international wars. The true test of the existence of civil war, say the court, as found in the writings of the sages of the common law, may be thus summarily stated : —

When the regular course of public justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposed to the government were foreign nations invading the land. The court expressly say in that case that it is not necessary that the independence of the revolted province or state should be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Reference is then made to the fact that the Queen of England, on the 13th of May, 1861, issued her proclamation of neutrality, recognizing hostilities as existing between the United States and the so-styled Confederate States; and then the court say that after such an official recognition by the sovereign, a citizen of such foreign state is estopped to deny the existence of a war with all the consequences as regards neutrals. Congress recognized the existence of war on the 13th of July, 1861; and the minority of the court held that a civil territorial war in the international sense did not exist until that act of Congress was passed. Two answers were made by the court to that objection : 1. That a prior declaration of war was not necessary to constitute that relation; and, 2. If it was, that the subsequent acts of Congress had a retroactive effect, and operated to cure the defect. A minority of the court denied that the acts of Congress would have any such operation; and the majority of the court, in replying to that objection, admit that it might possibly have some weight in the trial of an indictment in a criminal court, but say that precedents from that source cannot be received as authoritative in a tribunal administering public and international law, which is undoubtedly correct. The conclusion is that the President had a right, *jure belli*, to institute a blockade of the ports in possession of the States in rebellion which neutrals were bound to regard. The next question in the case was, whether the property of all persons residing within the territory of the

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States in rebellion, if captured on the high seas, was to be treated as enemies' property, irrespective of the question whether the owner was or was not in arms against the government. Responding to that inquiry, the court say that all persons within that territory whose property may be used to increase the resources of the hostile power, are in the contest liable to be treated as enemies, though not foreigners. They have cast off their allegiance, and made war on their government, and are none the less enemies because they are traitors. The produce of the hostile territory, say the court, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength are always regarded as legitimate prize without regard to the domicile of the owner, and much more so if he resides and trades within their territory. The Supreme Court, therefore, has decided that the present civil war is of such a character and magnitude as to give to the United States the same rights and powers which they might exercise in the case of a national or foreign war; that they have a right, *jure belli*, to institute a blockade of any ports in the rebellious States; that the proclamation of blockade was of itself conclusive evidence that a state of war existed which authorized and demanded such a measure, and that it made all persons residing in the territory liable to be treated as enemies, though not foreigners. Such conclusions are utterly irreconcilable with the proposition, that the taking of the ship in this case, under the circumstances described in the agreed statement, was a taking by pirates, as contended by the plaintiffs. The same views have also been expressed by the Supreme Court of Massachusetts in this very case, as may be seen by referring to the very able opinion of the court pronounced by the present chief justice. *Dole et al. v. N. E. Mut. Mar. Ins. Co.*, 6 Allen, 392. The opinion of the court was that it could not be maintained on the facts offered in proof, which were substantially the same as those agreed in this case, that the persons who seized and burned the ship were to be regarded as pirates within the ordinary signification of that word as used in the law of nations, or as commonly understood and applied in maritime contracts and adventures. They were not common robbers and plun-

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derers on the high seas. Continuing, the court go on to show that their acts were unlawful, and such as cannot be justified in our courts, but say, that on the facts offered to be proved, it appeared that they sailed under a commission issued by a government *de facto* claiming to exercise sovereign powers, and to be authorized to clothe their officers and agents with the rights of belligerents, and to send out armed cruisers for the purpose of taking enemy's vessels *jure belli*. Facts offered to be proved further showed, say the court, that "this *de facto* government had proceeded to raise armies, and had put them into the field, by which an actual state of war was created." Referring to those additional facts the court say, in this state of the case, it would be going very far to say that the taking of a vessel by an armed cruiser by such *de facto* government cannot properly be designated as a capture. Indeed, such an interpretation, say the court, would limit the meaning of the word as applied in mercantile contracts, to acts of forcible taking of ships or vessels on the high seas by duly established and recognized governments, acting according to the laws of war, and would exclude all such acts if unlawful or unjustifiable, or contrary to the municipal law of the country in which the contract was made, and to be performed, although done under an authority purporting to come from a government *de facto* engaged in actual war, and claiming to exercise belligerent rights. The decision of the cause, however, was not placed entirely upon that ground; but the court also held that the word "capture" was broad enough to include the taking in this case, even though the officers and crew of the steamer were regarded as pirates in the international sense. Suit was also commenced in the Supreme Court of Maine upon another policy on this same vessel for the same loss. Parties to that suit are *Dole et al. v. The Merchants' M. M. Ins. Co.*, and the opinion was given by Davis, J. He places the decision upon the second ground assumed by the Supreme Court of Massachusetts; but he admits that the decision might perhaps have been based upon a different ground. He goes on to say that war in fact existed at the time of the loss. Hostile forces were arrayed against each other in actual conflict. Its existence would not have been more

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palpable or real if it had been recognized by any legislative action, and though it was a civil war, the taking was not the less a capture for that reason.

The decision of the Tribunal of Commerce of Marseilles is to the same effect. 1 Lemonier, 251; Journal de Jurisprudence Commercial et Maritime de MM. Girod et Clariond, T. V., 235. Use will be made of the translation furnished at the argument, as it is believed to be correct. The case as stated shows that insurance was caused to be made in behalf of the owner of a certain amount of specie, laden on board a certain brig. The policy warranted the underwriters free from all casualties of war, hostilities, or reprisals by any maritime power whatsoever. The agent of the owners of the specie subsequently caused insurance to be effected by other underwriters, and solely against risks of war. The vessel sailed and loss occurred, and the master made a protest, from which it appeared that the brig was met by a privateer of Columbia, arrested and carried to Cumana, where the capture of the cargo was declared lawful, because a part was recognized as Spanish property, and the neutrality of the remainder was not sufficiently proved. Said agents of the owners of the specie afterwards made an abandonment to the underwriters who had assumed the risks of the sea, and also to the underwriters who had assumed the risks of war. The underwriters agreed, in their defence, that the abandonment was not valid upon several grounds not material to the present investigation, but they were divided on the question who ought to pay the loss in case the abandonment should be held valid. Those first mentioned maintained that the capture was a casualty of war, and therefore that the loss was not at their expense. The second underwriters contended that the capture could not constitute an act of war or of hostility arising on the part of a recognized maritime power, and consequently that the case came within the class of ordinary risks of the sea, piracies, aggressions, and the like, which were not assumed by them. The judgment given is too elaborate to be reproduced. The questions as stated are as follows: 1. Whether the capture made by the armed cruiser could be likened to acts of piracy; 2. Whether the loss ought to be

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be considered a casualty of war or of the sea. The conclusions were: 1. That revolted colonies, established as a *de facto* government, were not to be considered as pirates under the circumstances, which showed that they only attacked the flag and property of the mother country, and respected the flag and property of other powers; 2. That the underwriter who insured against the risk of war was liable, and that the warranty took the risk out of the other policy.

War having been recognized as existing between Spain and her colonies by our government, the Supreme Court of the United States held that it was the duty of the Federal courts, when a capture was made by either of the belligerent parties, without any violation of our neutrality, and the captured prize was brought innocently within our jurisdiction, to leave the property in the same condition as they found it, or to restore the same to the state from which it had been forcibly removed by the act of our own citizens. *The Nuestra Senora*, 4 Wheat. 497. The colonies of Spain during the existence of war between them and the parent country, and before the existence of the war had been recognized by the United States, were deemed by our government as belligerent nations, and entitled to all the rights of war as against the enemy. *The Trinidad*, 7 Wheat. 337. Judge Story said, in *United States v. The Malek Adhel*, 2 How. 232, that a pirate is deemed, and properly deemed, *hostis humani generis*, because he commits hostilities upon the subjects and property of all nations without any regard to right or duty, or any pretence of public authority. The evidence in this case shows no such state of the case, nor any pretence that the act of taking was committed *animo furandi*, as all the commentators agree that it must be, in order to amount to evidence of piracy as understood in the law of nations. Certain old writers upon the law of nations regarded a civil war as public on the side of the established government, and private on the part of the people resisting its authority; but Mr. Wheaton says that the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations. Wheat. on Int. Law, by Lawrence (ed. 1863),

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522, and note 171; Vattel, B. 3, c. 18, p. 424. International law, says Woolsey, comes in contact with internal wars so far as the laws of war, that is, of humanity and natural justice, are concerned, and also in the bearings of the war upon the interests and rights of foreign states. The same rules of war are followed in such a war, says the same author, as in any other — the same ways of fighting, the same treatment of prisoners, of combatants, of non-combatants, and of private property by the army where it passes. Nations thus treating rebels by no means, however, concede thereby that they form a state or have the remotest claim to such a concession. Woolsey on Int. Law (2d ed.), § 136, p. 231; Halleck on Int. Law, 333; *Davison v. Seal-skins*, 2 Paine, 333; 6 Webster's Works, 256, 257; *United States v. Baker et al.*, Warb. 370. For these reasons I am of the opinion that the taking of the ship in this case, under the circumstances disclosed in the agreed statement, was not a taking by pirates, as understood in the law of nations or within the meaning of the policy.

Suppose it were otherwise, however, still the question remains to be considered whether the meaning of the words "capture or seizure" is or is not broad enough to include a taking by pirates under the circumstances disclosed in the agreed statement. The Supreme Court of Massachusetts held, in the case of *Dole et al. v. N. E. Mut. Mar. Ins. Co.*, before cited, that the word "capture," as applied to the contract of insurance, was broad enough to include within the exception in the policy a taking by pirates in the most enlarged sense in which that term is used; that is, a taking by common depredators and plunderers who do not merely make war on the vessels of a particular country, or seek to destroy or take forcible possession of the property only of the citizens of any one nation or government, but who commit robbery and pillage upon all persons and property found on the high seas *lucri causa*, and who may therefore properly be designated as *hostes humani generis*. Since that opinion was delivered, the same question has been very thoroughly examined in the case before mentioned, by Davis, J., as the organ of the Supreme Court of Maine. Suffice it to say, that the court, after a careful revision of the authorities, came to the conclusion that the word

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"capture" was broad enough to include a taking by pirates, and held that the plaintiffs were not entitled to recover. Those two learned judges have examined most of the authorities referred to on this point, in the argument of this case. A repetition of those citations is unnecessary, as they are as open to scrutiny in those opinions, as they would be if made the subject of further comment. Exception may well be made to two or three of the cases, as it may be that the volumes in which they are contained were not accessible at the time those opinions were prepared. Comment will first be made upon the case of *Kleinwort et als. v. Shepard*, 1 El. & El. 447, because it must hereafter be regarded as a leading case upon the subject. The declaration was on a voyage policy from Macao to Havana, "warranted free from capture and seizure and the consequences of any attempt thereat." The policy contained the usual clause stating the perils insured against, which included "enemies, pirates, robbers, thieves, reprisals, takings at sea, and barratry of the master and mariners." Insurance was declared to be on a certain sum expended in provisions for the use of Chinese emigrants, and in advances on freights. The emigrants assaulted the master and crew, and took, stole, and carried away the ship. The defence was, that a forcible taking possession of the ship in the manner stated was a seizure within the meaning of the warranty. Judgment was delivered by Lord Campbell, Ch. J. He said it became necessary for the plaintiff to show that the word "seizure" was used in the warranty in some peculiar and restricted sense; and he admitted that it was sometimes introduced into policies where there was an apprehension of war, with the view to protect the underwriter, and to make him content with a peace premium.

But when it was introduced, the learned judge said there was no decision that it must be confined to belligerent seizure; and he added, that "we clearly think it would extend to captures and seizures by pirates." Exactly the same point was ruled by the same court in *Powell v. Hyde*, 5 El. & Bl. 607; and the ruling was the same way. The ruling was, that the exception introduced by the warranty was not confined to legal capture or seizure, but that an illegal capture or seizure was also within both

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the exception and the perils enumerated in the policy. Case of *Mc Cargo v. New Orleans Ins. Co.*, 10 Rob. (La.) 334, is to the same effect. *Naylor v. Palmer*, 8 Exch. 750; *Mellish v. Andrews*, 15 East, 15. Brief reference will also be made to some of the Continental writers, as translations were furnished at the argument which are believed to be correct. Ordonnance of 1681 upon this subject is as follows:—

Insurers are to bear all losses “ . . . from pillage, captures (*prises*), arrests of princes, declarations of war, reprisals, and generally all other perils of the sea.” Pothier, de Contr. D’Ass. 49, p. 68. The insurer is liable whether the capture was lawful or unlawful according to the laws of war, whether it was an act of hostility or brigandage; for however suffered, it is a peril of the sea, and the insurers are liable for all perils of the sea. 54, p. 79.

“Assured may abandon,” says Valin, “only in cases of capture (*prises*), shipwreck,” &c. Art. 46 of Ordon.

Referring to that article the commentator says: “In the first case, that of capture, it is immaterial whether the capture be legal or illegal; neither this article nor article 26 (above cited) makes any distinction, and in both cases it is a peril of the sea.”

The commentator then cites an opinion prepared by Emerigon, upon the distinction between a capture and an “arrest of princes.” P. 121. “A capture,” he says, “is when a vessel is taken as prize of war in a spirit of depredation, with a design to deprive the owner of it.”

It is either lawful or unlawful; lawful when made by a declared enemy, and according to the laws of war; unlawful when made by a pirate, a friend, or a neutral, or contrary to the law of nations. But whether the capture be lawful or unlawful the insurers are liable.” This word “capture” as used in the Ordonnance, without any qualification, must be taken in a general sense, and as including all captures, lawful and unlawful, for both generally lead to the same result.

The Roman law enumerates among the perils the attacks of enemies, *hostium incursus*.

“Whether the capture be lawful or unlawful, the insurers are

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none the less responsible. They insure, not only against captures made by enemies or pirates, but also against such as are improperly made by friends, allies or neutrals; in a word, against all captures in the way of hostilities, brigandage, or otherwise. Whoever commits depredations, says Targa, is a corsair, and becomes an enemy." Boulay Paty, vol. 2, p. 102.

Taken together, the authorities cited support the views of Mr. Marshall, in his treatise on the law of marine insurance. He says that capture is where a ship is subdued and taken by enemies in open war, or by way of reprisals, or by pirates, and with intent to deprive the owner of it. Marsh. on Ins. 422. The weight of authority is adverse to the views of the plaintiffs; and in the judgment of this court the meaning of the word "capture" is broad enough to include a taking by pirates.

The fourth proposition of the plaintiffs is, that it is not the taking of the ship, as set forth in the agreed statement, but the fire which was the proximate cause of the loss described in the declaration. The facts are that the ship was boarded "with a force which her officers and crew were unable and did not attempt to resist. The assailing force plundered her of her papers, some sails, spars, provisions and other articles, and took out her officers and crew; and after her officers and crew had been taken out of her, she was set on fire by those who took her, and was thereby totally destroyed." The rule is, that where different causes concur, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or not in activity at the consummation of the disaster. 1 Phil. on Ins. § 1132. The argument for the plaintiffs is, that the fire not having been a means used in taking possession of the ship, but having occurred after the taking was complete, and after her assailants had obtained undisputed possession of her and taken out her officers and crew, was the proximate and efficient cause, and by law the sole cause, of her loss. They deduce that conclusion by virtue of the maxim, *causa proxima non remota spectatur*, and by virtue of the assumed theory that the fire was a separate and distinct peril from the capture. But the defendants contend that the hostile acts of the officers and crew

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the policy which is a natural consequence of the perils insured against. *Peters v. The Warren Ins. Co.*, 14 Pet. 109. The loss in this case was the natural effect of the capture, and under the facts disclosed in the agreed statement, it may be regarded as the inevitable consequence of the hostile seizure. Such losses are held by all the writers as fairly attributable to the original taking. *Coolidge v. New York F. Ins. Co.*, 14 Johns. 316; *Savage v. Pleasants*, 5 Binn. 411. Where the master, in violation of his duty, wilfully undertook to run a blockade, or to engage in illicit trade, and was captured, barratry, and not capture, was held to be the cause of the loss in determining whether it shall be borne by the underwriter who takes the risk of capture, but does not insure against barratry. *Am. Ins. Co. v. Dunham*, 12 Wend. 463; S. C., 15 Wend. 1; *Suckley v. Delafeld*, 2 Caines, 222; *Havelock v. Hancill*, 3 T. R. 277. Cases undoubtedly arise, where, after one peril has ceased to act, another independent and distinct peril, having no necessary or natural connection with the first, supervenes and causes the loss; and in that class of cases, though it be true that the vessel might not have been exposed to the second peril, or might not have been so injuriously affected by it without the concurrence of the first, the second is deemed to be in law, as it is in fact, the cause of loss. *Jones v. Schmoll*, 1 T. R. 130, n.; *Delano v. Bedford Ins. Co.*, 10 Mass. 353; *Law v. Goddard*, 12 Mass. 113.

Several cases also are cited, where a peril insured against, put the vessel in such a position that she was acted upon by another peril, distinct in its origin and character, and which was not insured against; but it is not perceived that such cases can have any bearing upon the question before the court. *Livie v. Janson*, 12 East, 653; *Rice v. Homer*, 12 Mass. 234. But where a fire arose from the barratry of the master or crew, it was held that the loss was by barratry, and was not chargeable to an insurer who insures against fire, but not against barratry. *Waters v. Merchants' Lou. Ins. Co.* 11 Pet. 219; *Grim v. Phoenix Ins. Co.*, 13 Johns. 457. So where the vessel was sunk by a shot fired from a battery, the loss was held not to be by sinking, but by the hostile act of the soldiers, and therefore within a warranty against capture

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and seizure, like the one in this case. *Powell v. Hyde*, 5 El. & Bl. 607.

Defendants also refer to the case of *Naylor v. Palmer*, 8 Exch. 339, which is a leading case. Insurance was on advances to be repaid on the safe arrival of certain emigrants at their port of destination. They seized the vessel on the voyage, compelled the crew to work her to another port, and there, without doing any injury to the vessel, left her. The claim was, that their failure to arrive, and the consequent loss was owing to the unwillingness of the emigrants to proceed; but the court held that the proximate and efficient cause was the seizure, and that the loss was total. See also *General Ins. Co. v. Sherwood*, 14 How. 364, 367.

The present case, however, does not depend upon any very critical application of the doctrine deducible from the maxim under consideration, because the agreed statement shows that the capture and burning were parts of one and the same acts of hostility. Looking at the whole case, it is clear that the plaintiffs cannot recover, and there must be judgment for the defendants.

NEW HAMPSHIRE DISTRICT.

MAY TERM, 1865.

WALTER AIKEN v. THE MANCHESTER PRINT WORKS.

Where a person had purchased of the owner of the invention certain knitting-machines, with which the vendor was accustomed to send a package of the needles used in the same, it was *held*, that the sale of the machines did not carry with it a right to the purchaser to manufacture new needles of the same construction as those sold him, when those which he had bought were worn out, although the machines could not be operated without them, and the needles were the patented invention of the seller; the needles, however, being the subject-matter of a different patent from that covering the machines. The grant of a machine, with the right to use it, does not import the same privileges under the patent as the sale of the right to make and vend the patented machine.

In the latter case the purchaser buys a portion of the franchise, and the right he acquires necessarily terminates at the time limited for the continuance of the patent; but in the former, the machine sold passes outside of the monopoly, and is no longer under the protection of the Patent Act.

Redress for injury in such case must be sought in the State courts, under State laws, and not under the special jurisdiction conferred on the Federal courts by the Patent Act.

In this case the purchasers could repair the machines and the needles, or improve them (if in so doing they infringed no patented right), because both needles and machines had paid the royalty to the patent, and were outside the limits of the monopoly, and the property of the purchaser; but the purchase of these particular machines and devices conferred no power to manufacture new ones to take their places when once worn out or destroyed.

TRESPASS on the case for the alleged infringement of a patent on knitting-machine needles. The action was in the name of the assignee of the patent. The inventor was James Hibbert; and the original patent was issued to him on the 9th of January, 1849. Subsequently the inventor deceased, and the patent on the 9th of December, 1862, was reissued to his administrator, and extended for a further term of seven years. The administrator assigned the patent, and the first assignee assigned to the plaintiff, who was the legal owner of the entire interest. Plea was the general issue with notice of special matter, that the original patentee was not the first and original inventor of the

improvement; but the actual defence set up at the trial was that of license from the plaintiff. The extended patent was introduced by the plaintiff, and he also offered evidence to show that the defendants had made and used the patented device, as alleged in the declaration. The invention was stated in the specification to consist of a latch or tongue in connection with the hook of the needle, sweeping freely back and forth upon a centre pin; and it was not controverted that the invention was well described. The claim of the patent was for the application of a latch or tongue to the hook of the needle, and operated as therein described; and the claim was in the view of the court, in exact accordance with the description in the specification.

The defendants offered to prove that they purchased certain knitting-machines of the plaintiff, with the right of using the same, and that the needles made and used by them were used in such machines as they had purchased of the plaintiff, or which he had manufactured for his brother, who had sold the machines to the defendants with the knowledge and consent of the plaintiff.

The parties conceded that the knitting-machines were also the subject of certain other patents, and that the plaintiff was in whole or in part the legal owner of such patents. The evidence showed that the several knitting-machines purchased by the defendants, contained a full set of needles, and that the purchase and sale embraced a surplus number of the same tied up in a small bundle attached to each machine, and which were delivered with the machines as part of the purchase and sale. New needles, it appeared, would last about four weeks, and the machines could not be operated as knitting-machines, without the needles.

The defence was, that the sale of the machines by the plaintiff to the defendants gave them the right, when the needles which were made part of the purchase were worn out, to manufacture others and to replace those worn out, and to use the same for the purposes for which the machine was originally constructed. But the court instructed the jury that the sale by the plaintiff, and the purchase by the defendants, of the knitting-machines and the needles in and accompanying the same, did not confer upon the

defendants any right, after the needles were worn out, or had become useless, to manufacture other needles, as patented to the plaintiff, and use the same in the machines so sold and purchased.

Under the ruling of the court, a verdict was rendered for the plaintiff, subject to the opinion of the court upon the question of law reserved, with power in the court to render judgment on the verdict, or to set the same aside and to enter judgment for the defendants; but reserving the right to either party to turn the case into a bill of exceptions.

Causten Browne and *Daniel Barnard*, counsel for plaintiff.

S. N. Bell and *D. Clark*, counsel for defendants.

CLIFFORD, J. The proposition of the defendants is, that the sale of the machines implies the right to use the same, and that, when the needles were worn out, so that the machine could not be operated, it carries with it the right to manufacture new ones as the necessary means to enable them to enjoy the right of use implied by the purchase. Take the question as stated, and it is certainly one of importance, and one which deserves to be carefully considered. Analogous questions, however, have several times been presented to the Supreme Court, and the views of the court, as expressed in those cases, will aid very much in reaching a right conclusion as to the rights of the parties in this controversy. An intelligent discussion of the question requires that the distinction between the grant of the right to make and vend the patented machine, and the grant of the machine with the right to use it, should be kept constantly in view. Such a question first came before the court in the case of *Wilson v. Rousseau et als.*, 4 How. 646, where it was much considered, and it was generally conceded that the true distinction was there maintained, but it must be admitted that there are some expressions in the opinion of the court not quite satisfactory. Subsequently the same question was again presented to the same court in the case of *Bloomer v. McQuewan et al.*, 14 How. 549, which places the question upon its true foundation. Patentees acquire the right under a patent to exclude every one from making, using, or vending the thing patented without their permission, and they

acquire nothing more. When the patentee sells the exclusive privilege of making, using, or vending it for use in a particular place, the purchaser buys a portion of the franchise; but the interest he acquires necessarily terminates at the time limited for the continuance of the patent, unless it be otherwise specially stipulated in the contract. But the purchaser of the implement or machine, for the purpose of using it in the ordinary pursuits of life, stands on different grounds. When the patented machine rightfully passes from the patentee to the purchaser or from any other person by him authorized to convey it, the machine is then no longer within the limits of the monopoly. Then the machine so sold passes outside of the monopoly, and is no longer under the protection of the Patent Act. Redress, in such cases, in case of injury, must be sought in the courts of the State, according to the laws of the State, and not in the Federal courts, under the special jurisdiction conferred for the protection of patent rights. Repeated decisions of the Supreme Court have laid down this doctrine, until it cannot any longer be regarded as an open question. *Chaffee v. The Boston Belting Co.*, 22 How. 217; *Bloomer v. Millinger*, 1 Wall. S. C. 351. Able counsel, in the case last named, desired the court to qualify the previous decisions upon this subject; but the unanimous opinion of the judges was opposed to the suggestion, and held that such a purchaser may continue to use the machine until it is worn out, or he may repair it or improve upon it, as he pleases, in the same manner as if dealing with property of any other kind. Web. Pat. Cases, 413, note *p*. Great care must, however, be observed in applying that rule to the present case. Undoubtedly both the machines and the needles purchased by the defendants fall within the rule. The defendants may repair them or improve upon them as they please, so that they do not infringe any patent right, because the machines and the needles, having paid the royalty imposed under the Patent Act, are no longer within the limits of the monopoly. These articles have become private, individual property, not protected by the laws of the United States, but by the laws of the State in which the property is situated. The indubitable right of the defendants is to repair

or improve the articles as long as they will last, but they cannot make new ones, nor can they, in the exercise of their right to repair the old ones, infringe another man's patent. Right to repair is limited by the same rules that operate in the repair of other property. The owner may repair, but he cannot appropriate the materials belonging to another man, in effecting the purpose. Purchasers in this case may repair the needles they purchased, but they cannot manufacture new ones, without license. Reference is made to the case of *Wilson v. Simpson*, 9 How. 123; but a careful examination of the case will show that it affirms the very rule here maintained. When we speak of the right to restore a part of a deficient combination, we mean, say the court, the part of one entirely original, and not of any other patented thing, which has been introduced into it to aid its intended performance. The cutters and knives, in that case, were not subject to a patent, and of course the respondent had a right to use them as materials to repair his machine; but unfortunately for the defendants in this case, the needle is subject to a patent, and in making and using it they have infringed the right of the plaintiff.

In view of the whole case, we are clearly of the opinion that there must be judgment on the verdict.

MASSACHUSETTS DISTRICT.

MAY TERM, 1865.

CHARLES FITZ, Libellant, v. THE GALLIOT AMELIE. B. RIVIERE
et al., Claimants.

The master is justified in selling the ship as the best thing that can be done for the interest of all concerned, under the following circumstances: —

When the ship is disabled by perils of the sea, and the master has no means of getting the repairs done in the place where the injury occurred; or, if being in a place where the repairs might be made, he has no funds in his possession, and cannot, on account of the distance or other sufficient cause, communicate with the owner, and is not able to raise the necessary means by bottomry, or otherwise, to execute the repairs; also, if the injuries to the ship are so great that the cost of repairing her would be greater than her value after the repairs were completed; also, if the ship is disabled so that she cannot proceed, and the cost of repairs will amount to more than one half her value, reckoning one third new for old, and the master has no funds, and can neither procure any nor communicate with the owner, and the whole circumstances are such that a prudent owner would decide to break up the voyage.

The circumstances, which create a moral necessity for the sale of the vessel by the master, have the effect to constitute the master the agent of all concerned, and therefore the title of the purchaser becomes complete and absolute.

When a ship is thus lawfully sold, any lien upon her is transferred to the proceeds of the sale, which, by operation of law, become the substitute of the ship, in the sense of the admiralty law.

THIS was an admiralty appeal in a cause of contract civil and maritime. The complaint of the libellant was, that on the 13th of March, 1862, he shipped on board the Amelie, then called the Plata, and lying in the port of Paramaribo, certain merchandise to be transported to Boston, and there to be delivered to the libellant. It was alleged that the vessel subsequently departed on the voyage and arrived at the port of destination, but that the master neglected to deliver a large part of the cargo, and failed to render any satisfactory account of the same. The defence of the claimant was, that the vessel, arrived at Port au Prince, unseaworthy, and utterly unfit and unable to proceed on her voyage, or any voyage to sea; that very exten-

sive and costly repairs were necessary, before she could be rendered seaworthy ; that neither the master nor the owners had any funds or any credit at that port, wherewith to procure the repairs to be made ; and consequently, that the master, not being able to procure the funds by bottomry bond or otherwise, to execute the repairs, on the 12th of June following sold the vessel at auction, and that he, the claimant, then and there became the lawful purchaser of the vessel.

The case came before the court upon an agreed statement of certain facts, in substance the following : —

The cargo was received on board the vessel at Surinam, to be transported and delivered as alleged in the libel. The invoice value of the cargo was \$ 8,306.67, and the master signed bills of lading for the same in the usual form. The vessel suffered damage by perils of the sea. The cargo consisted of two hundred and forty-two hogsheads and sixteen barrels of molasses, fifty hogsheads and nine barrels of sugar, and sixteen pieces of old copper. Some of the cargo was also damaged by the perils of the sea, and thirty hogsheads of the molasses were jettisoned for the common safety, and thirty more were intentionally stove in the hold and their contents lost.

It appeared that the vessel put into Port au Prince for repairs, and that she was there twice surveyed and ordered to be repaired. Repairs under those orders were made, to the extent of \$ 1,000, when it was ascertained that more extensive repairs were required than was at first deemed necessary, whereupon a third survey was called, which resulted in a more thorough examination of the vessel. A sale of the vessel was made, under the recommendation of the third report. The libellant denied the validity of the sale ; and the question whether it was rightfully made, under the circumstances, was the first and principal question in the case.

Other questions were discussed at bar, but, under the view of the case taken by the court, it will not be necessary to advert to them in this report.

F. C. Loring, proctor for libellant.

C. W. Loring, proctor for claimants.

Fitz v. The Galliot Amelie.

CLIFFORD, J. The authority of a master to sell his ship under any circumstances was denied by some of the Continental writers upon maritime law, and by some of the early decisions in the courts of the parent country. The reason given for the prohibition was, that such authority, if allowed, would tend to encourage fraud. *Tremenhere v. Tresillain*, 1 Sid. 425; *Johnson v. Shippen*, 2 Ld. Raym. 984; *Reid v. Darby*, 10 East, 143; Abb. on Shipp. (5th ed.) 9; *Ekins v. East India Company*, 1 P. W. 895.

A careful scrutiny of those cases, however, will show that the circumstances in most of them were not such as to justify a sale in any view of the law; and the decision in some of them was placed upon that ground. Subsequent cases have clearly established the doctrine even in that country, that the master in a case of extreme necessity may sell the ship for the benefit of the owners or of all concerned. *Hayman v. Molton*, 5 Esp. 65; *The Fanny et al.*, Edw. A. R. 117; *Milles v. Fletcher*, 1 Doug. 231; *Idle v. The Royal Assurance Co.*, 8 Taun. 755; *Freeman v. East India Co.*, 5 B. & A. 617; *The Cannan Meaburn*, 1 Bing. 243; *Read v. Bonham*, 3 Bro. & Bing. 147; *Underwood v. Robertson*, 4 Camp. 138. Abbott, in his work on Shipping, says the master possesses every power necessary for the employment and navigation of the ship; and he admits that, in a case of extreme necessity, he may sell the ship, but insists that he is bound, before exercising that authority, to try every other expedient to raise money. Abb. on Shipp. 9. But the rule is much better stated by Parke Baron, in *Hunter v. Parker*, 7 Mees. & W. 342, to which special reference is made. He says that the master has by virtue of his employment, not merely those powers which are necessary for the navigation of the ship, and the conduct of the adventure to a safe termination, but also a power when such termination becomes hopeless, and no prospect remains of bringing the vessel home, to do the best for all concerned, and therefore to dispose of the ship for their benefit.

The libellant admits that it is well settled in this country that the master, in a case of necessity, may sell his ship, and the admission is a very proper one in this court, as the point has been

at least three times authoritatively decided by the Supreme Court of the United States. *The Patapsco Ins. Co. v. Southgate*, 5 Pet. 620 ; *N. E. Ins. Co. v. Sarah Ann*, 13 Pet. 400 ; *Post v. Jones*, 19 How. 157. Speaking of the authority of the master to sell his ship, Mr. Justice Thompson said in the first case cited, that there can be no doubt that the injury to the vessel may be so great and the necessity so urgent, as to justify a sale. There must be, says the court, this implied authority in the master, from the nature of the case. He, from necessity, becomes the agent of both parties, and is bound in good faith to act for the benefit of all concerned ; and the underwriter must answer for the consequences, because it is within his contract of indemnity. All the circumstances must be submitted to the jury, and they must find both the necessity and the good faith of the master in order to justify the sale. The opinion of the court in the second case was delivered by Mr. Justice Wayne, who does not stop to argue the question of authority, as that had been decided in the preceding case, but proceeds at once to the statement of the conditions under which it must be exercised, in order that the sale may be held valid. Those conditions as there stated are, that the master must act in good faith, exercise his best discretion for the benefit of all concerned, and that the sale can only be made upon the compulsion of a necessity, to be determined in each case by the actual and impending peril to which the vessel is exposed, from which it is probable, in the opinion of persons competent to judge, that the vessel cannot be saved. He admits, however, that the necessity for a sale cannot be denied, when the peril, in the opinion of those capable of forming a judgment, makes a loss probable, although the vessel may in a short time afterwards be got off and put afloat. Mr. Justice Grier delivered the opinion in the third case cited ; and he affirms that it cannot be doubted that a master in certain cases of absolute necessity has power to sell both vessel and cargo. Such a necessity may be held to exist, say the court in that case, where the vessel is disabled, stranded, or sunk, if it appear that the master had no means, and could raise no funds to repair, so as to prosecute his voyage. Unless the vessel is so disabled that it is rendered unsafe for her

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to proceed on her voyage, the question as to the necessity of selling her cannot arise. Nothing short of proof of that fact will authorize the conclusion that the authority of the master was so enlarged that he became the agent of all concerned, and that he was clothed with power to determine in their behalf what should be done for their common interest. *Prince v. Ocean Ins. Co.*, 40 Me. 498. When the vessel is so disabled that she cannot proceed on her voyage, and the master has no funds to make the necessary repairs to enable her to proceed, and cannot raise any for that purpose, by bottomry or otherwise, he must determine, in the absence of the owner, what the interest of all concerned requires him to do. His authority in the premises under those circumstances, is not derived from the owner, but is devolved upon him by law, and consequently it is his duty to act according to his best judgment. Sale of the ship is a necessity within the meaning of the commercial law, when under the circumstances indicated, nothing better can be done for the benefit of the owner or those concerned in the adventure. If the voyage be broken up in the course of it, by ungovernable circumstances, the master, says Chancellor Kent, may sell the ship, provided he do so in good faith, for the good of all concerned, and in a case of supreme necessity, which sweeps all ordinary rules before it. § Kent's Com. 173. Neither necessity nor good faith is alone sufficient to make such a sale valid, but both must concur, and must be affirmatively shown by the party setting up the sale. *The Henry*, 1 B. & H. 470.

My judgment is, said Judge Story, upon the most careful survey of the authorities, as well as upon the general principles of law, that the master has a right to sell the ship in cases of urgent necessity; and I adopt the argument at the bar, that it must be proved that there was a pressing necessity to justify the sale. *The Schooner Tilton*, 5 Mas. 465. Other courts of the highest respectability have employed the same or similar expressions; but the explanations of Tindal, Ch. J., in *Somes v. Sugrue*, 4 C. & P. 282, show to a demonstration that there cannot be in such a case either a legal or physical necessity, and consequently that it is only a moral necessity which is required

to be shown, in order that the sale may be held to have been justified. Two decisions of Judge Story in this circuit are also to the same effect. *Pope v. Nickerson*, 3 Story, 465; *Robinson v. Com. Ins. Co.*, 3 Sumn. 226. Whether the necessity actually exists or not depends upon the circumstances, and so when carefully examined are all the well-considered cases. *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. 249; *The Sarah Ann*, 2 Sumn. 215; *Hall v. Franklin Ins. Co.*, 9 Pick. 476; *American Ins. Co. v. Center*, 4 Wend. 51; *Peirce v. Ocean Ins. Co.*, 18 Pick. 83.

Different forms of expression are employed by different courts and jurists in describing the degree or intensity of the necessity which is required to justify the sale. Doubts are entertained whether any of the epithets, so employed, express very fully or definitely the precise idea intended to be conveyed. Perhaps it is not possible to devise any rule which will apply to all cases, but it is believed that some approximation may be made in that direction.

When the ship is disabled by perils of the sea, and the master has no means of getting the repairs done in the place where the injury occurred, or, if being in a place where the repairs might be made, he has no funds in his possession and cannot, on account of the distance or other sufficient cause, communicate with the owner, and is not able to raise the necessary means by bottomry or otherwise to execute the repairs, or if the injuries to the ship are so great that the cost of repairing her would be greater than her value after the repairs were made, or if the ship is disabled so that she cannot proceed, and the cost of repairs will amount to more than half her value, reckoning one third new for old, and the master has no funds, and can neither procure any nor communicate with the owner, and the whole circumstances are such that a prudent owner would decide to break up the voyage, then the master is justified in selling the ship as the best thing that can be done for the interest of all concerned. Such a state of circumstances creates the moral necessity, the urgent necessity, the extreme necessity, the imperious, uncontrollable necessity, described in the decided cases, and authorizes the mas-

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ter to sell the ship, if in his judgment, honestly exercised, the sale will best promote the interest of all concerned. When those conditions, or any class of them, concur, it becomes the duty of the master to decide the question ; and if he finds that the disaster will be most alleviated, and the interests of all will be best served by a sale, then it is his duty to act in the premises ; and if he makes the sale *bona fide* as the agent of all concerned, it is valid, and all are bound by his acts. Reference is made by the libellant to certain recent decisions in the admiralty court of the parent country, in which it is supposed that a more stringent rule is laid down, but a careful examination of the cases will show that they do not warrant any such conclusion. Cases referred to are the following: *The Eliza Cornish*, Spinks, Ecc. & Adm. 46 ; *The Glasgow*, 1 Swabey, Adm. 146 ; *The Margaret Mitchell*, 1 Swabey, Adm. 386 ; *The Australia*, 1 Swabey, Adm. 484 ; *The Bonita & Charlotte*, 1 Lush. Adm. 261.

The general rule is, says Dr. Lushington, in the case first cited, that the master has no authority to sell the ship, but he adds that, "whatever opinion may have been doubtfully expressed on the subject, it appears to me clear, upon reason and authority, looking at what the law now is, that in case of necessity he must be invested with that power. Borrowing the language of the opinion in the case of *Robertson v. Clarke*, 1 Bing. 445, he says : "I agree that it is not sufficient to show that the sale was *bona fide* and for the benefit of all concerned, unless it be also shown that there was an urgent necessity for its being resorted to." The same rule is laid down in the second case, but the same judge says that "the necessity is to be judged by all the circumstances: 1. The state and condition of the vessel. 2. The consequences of not proceeding to sell. 3. The facility of communicating with the owner. 4. The resources of the master, or the total absence of all resources. 5. The power and means of the owner to avert a sale." The third case asserts that it is clear from the authorities that, though in early times the validity of a sale by a master in a foreign port was doubted, yet now it is decided that he has an implied authority in cases of extreme necessity, and in those only. Judgment was also pro-

nounced in the fourth case by the same learned judge, and in that he states that the necessity which the law contemplates is not an absolute impossibility of getting the vessel repaired, but if the ship cannot be sent upon her voyage without repairs, and if the repairs cannot be done except at so great and so certain a loss that no prudent man would venture to encounter it, that constitutes a case of necessity ; and he states the rule in the fifth case in the same language as in the first, and borrows it from the same source. Taken as a whole, these cases, I think, confirm the rule as before explained. Applying that rule to the present case, it is quite clear what the result must be. The record shows that the vessel sailed for Boston on the 16th of March, 1862, and that she was stanch and in good repair. Full proof is exhibited that she encountered severe storms, was struck by a heavy sea, and was so badly crippled, injured, and broken that it was with difficulty that she arrived at Port au Prince. Due protest was made by the master, and she was three times surveyed. The first two surveys recommended temporary repairs to enable her to proceed to her port of destination. The surveyors' reports describe in detail the apparent injuries to the vessel, and specify the temporary repairs required to enable the vessel to proceed. They show, when taken in connection with the statements of the protest and the parol testimony, that the vessel as examined upon the outside and with the cargo on board, was very badly stove and crippled, and that she was emphatically disabled from proceeding on the voyage. The second report states that the surveyors recommend that "the vessel be repaired here sufficiently for her to proceed on her voyage to Boston. It being well understood that total and adequate repairs to the damage which the vessel has suffered are impossible in this port." Temporary repairs were accordingly made at the cost of \$1,000 ; but the third report shows that upon taking off the side planking to replace the same by new, as was ordered in the second report, the injuries to the vessel were found to be very much greater than was supposed or could have been known when the prior surveys were made. On the last survey were three competent masters of vessels, Lloyd's agent, and the agent of the New York and Philadel-

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phia underwriters. They all agreed that it was not possible to make the necessary repairs in that port in a proper manner; that even if the necessary materials could be obtained, it would cost, in addition to the \$1,000 which had been expended, not less than \$3,500 Spanish, and that it would take four months to make the repairs; and they also found that the whole cost of repairs would be more than the vessel would be worth after the repairs were made. Their report I think is sustained by the evidence in the case.

Sale of the vessel was accordingly made on 12th of June, 1862, for the benefit of all concerned, and the claimant became the purchaser for the sum of \$407 in gold. Claimant repaired her at a cost of \$1,695.31 in gold, and despatched her to Boston. She was libelled here shortly after her arrival, and was sold under the order of the District Court. The proceeds of sale amounting to the sum of \$2,138.64 remain in the registry of the court. Libellant claims a lien on the vessel for so much of the cargo as was sacrificed for the common benefit, and also for so much of the cargo as has not been delivered. He resists the sale as unauthorized; but I am of the opinion that it was clearly justified within the principles already explained.

The second proposition of the libellant is that the sale, even if necessary and valid, operated only to pass the title of the owner, and that the purchaser took his title, subject to the lien of the libellant; but I am of the opinion that the circumstances which create the moral necessity for the sale of the ship in a case like the present, have the effect to constitute the master the agent for all concerned, and consequently that the title of the purchaser became complete and absolute. *The Tilton*, 5 Mas. 475; *Miles v. Fletcher*, 1 Doug. 232; *Idle v. The Royal Exch. Ass. Co.*, 8 Taun. 755.

On this point I adopt the views of the respondents, that the lien when the ship was lawfully sold, was transferred to the proceeds which became by operation of law the substitute for the ship in the sense of the admiralty law. *Brown v. Lull*, 2 Sumn. 443; *Sheppard v. Taylor*, 5 Pet. 675. Bear in mind that the sale in this case was a sale from necessity; and I am of the opin-

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ion, notwithstanding the doubt expressed in the case of *The Catharine*, 1 Eng. L. & Eq. 681, that the purchaser took a full title free of the lien set up by the libellant. Unless such be the law, then the authority conferred to sell in a case of necessity is a mockery, as no prudent man would ever purchase such a title.

Having come to these conclusions, it is unnecessary to decide the other questions discussed at the bar. Decree affirmed. Libel dismissed with costs.

SIMON WING v. CHARLES F. RICHARDSON.

The presumption that the person named in a patent as the patentee, is the original and first inventor of what is therein claimed, arises from the fact of the grant of the patent to the patentee, and does not therefore exist until the issue of such patent.

Issue of a patent affords no ground for a presumption in favor of the originality of the patentee's invention, at any time earlier than the filing of the original application in the Patent Office.

If it be desired to show that an invention was really made prior to the filing of the application, it must be done by proper evidence adduced by the party asserting the fact, because no such presumption arises from the patent, or the application, or both together. Where the defence to a bill in equity charging infringement of certain letters-patent is, want of novelty, and a denial that the patentee was the original and first inventor of the thing claimed, the party using this defence must establish it to the satisfaction of the court, else the patentee will be presumed to be the rightful grantee of the patent.

The court will use care that inventors are protected from the unjust claims of persons asserting themselves to be the original inventors of what has been patented to another, with a view to destroy the validity of the patentee's exclusive privilege; and on the other hand, the public must be protected from patents which, by means of reissues, have been so expanded as to embrace more than the real invention of the patentee.

BILL in equity for an infringement of certain reissued letters-patent on "a new and useful plate-holder for cameras." The complainant was the assignee of the patent, the inventor being one A. S. Southworth; and the patent was dated April 10, 1855.

The bill charged infringement upon the respondent, and prayed for an account and for an injunction.

All the other facts necessary to an understanding of the case, and the invention as claimed by the patentee, are sufficiently explained in the opinion of the court.

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B. R. Curtis, Chauncey Smith, and S. W. Bates, for complainant.

J. F. Redfield and W. A. Herrick, for respondent.

CLIFFORD, J. Several defences are set up in the answer, but the one principally relied on at the argument, consists in a denial that the patentee is the original and first inventor of the improvement described in the letters-patent. Letters-patent are granted by the government under authority of law, and, when regularly issued, and in the usual form, they are, if introduced in the case, *prima facie* evidence that the person named as such was the original and first inventor of what he has described therein as his improvement. Such presumption, however, in the absence of the application for the patent, extends back only to the date of the letters-patent, and in no case does it extend further back than to the time of the filing of the original application. Whenever a party desires to show that his invention was made prior to the date of his application for the patent, he must prove the fact by other sufficient evidence, because no such presumption arises from the letters-patent or the application or both combined. The specification of the reissued letters-patent describe the invention as certain improvements in taking photographic impressions as therein described. Separate plates, as the inventor represents, had previously been used for each impression, and consequently where several impressions were to be taken, as in multiplying copies, it became necessary that the plate should at each impression be removed and replaced by another. The effect of those changes was to cause delay and inconvenience. The object of this invention is to remedy that difficulty, and it consists, as the patentee states, in bringing successively different portions of the same plate, or several small plates in one plate-holder, into the field of the lens of the camera. The practical operation of the machine is, that it brings different portions of the same plate, or several smaller plates secured in one plate-holder, into the axis of the focus of the lens, so that several impressions may be made on the same plate with equal correctness. The claim of the reissued patent is, the "bringing the different portions of a single plate, or several smaller plates, successively into the field of the lens

of the camera," substantially in the manner and for the purpose set forth in the specification. The patentee states that in carrying out his invention, he makes use, as the preferred method, of a peculiarly arranged frame, in which the plate-holder is permitted to slide, but in which its position is so definitely indicated, that the operator can quickly and accurately adjust the plate or plates, to effect the described result. Decided preference is given to that arrangement; but the patentee states that his improvement may be embodied, by causing the lens of the camera to be made adjustable in different positions with respect to the plate, so that different portions of the plate, although it remains stationary, may be successively brought into the field of the lens. One of the experts describes the invention embodied in the patent, as a mechanism so organized that a lens may be properly focussed with regard to different plates, or different parts of the same plate, without removing the plate from the mechanism, until as many impressions are made as may be desired; and it is not perceived that the description is too broad, if the definition be limited to the particular means set forth in the specification. Doubt cannot be entertained that the invention is one of merit, and it is equally clear that the patentee, whether the original and first inventor or not, was the actual inventor of his improvement, and that, in making it, he borrowed nothing from any of the devices set up in the defence. Nothing of that kind is pretended, but it is insisted that the evidence shows as matter of fact, that an apparatus substantially the same had been constructed and reduced to practice by one or more persons at a prior date, so that the patentee is not the original and first inventor of his alleged improvement. The patentee gave the directions for making his first model, or machine, in August, 1846, and it was made and sent to him at Boston in November following. The design of the camera then constructed was, that it should slide in the frame so as to make successive pictures in the axis of the focus of the lens, but a frame was never actually adapted to that machine. The statement of the patentee is explicit, that it was designed to operate in either of the modes pointed out in the specification of the reissued patent, but the frame was never made,

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and consequently was never so used. He also states that he constructed another machine for the same purpose, in the year following, which was used in taking pictures for seven or eight years. The principle was the same, but instead of moving the frame, the apparatus was so constructed that it moved the lens over the plate, being, in fact, the same arrangement suggested in the patent on which the suit was founded. The reasons given by the patentee, why he reduced the second form of his invention to practice, before he adapted a frame to the first machine was, that the first would be expensive, and that the second required fewer changes in the old apparatus, and could be perfected and put in operation at much less expense, as he could use his old camera and old frame. The belief of the witness is, that he completed that machine in 1847, but he states positively that he used it early in the spring of 1848, and that it was a completed machine. His recollection is distinct that he completed it here, in this city, before he went to California, and that he commenced preparations to go there in the winter of that year.

Suffice it to say, without reproducing more of the testimony, that the invention held by the complainant is shown not only to have been made as early as the latter part of 1847, or the first part of the year 1848, but that the same was reduced to practice, as an operative machine. Respondent does not controvert the position that the patent, if it be valid, covers the two methods described in the specification. Both undoubtedly were invented by the patentee, and they are clearly embraced in his claim. Such are the views of the experts, and such is the legal construction of the patent.

2. Infringement is clearly proved, and the allegation in that behalf is scarcely denied. Regarding the evidence as plenary upon that point, it does not seem to be necessary to say more upon the subject.

3. The reissued patent in this case is for the same invention as that described in the original patent, and therefore is not affected by the cases cited in that behalf by the respondent.

4. Abandonment is not proved. On the contrary, the reasons assigned for the delay which ensued before the application for

the patent was presented, are satisfactory, and they show that there is no unexplained want of diligence in perfecting the invention.

5. The patent of the complainant is not for a principle or result, but for the means described for accomplishing the result, and consequently, is valid notwithstanding that objection.

6. The evidence offered by respondent to show that others had made similar machines, prior to the date of the invention in question, is not satisfactory. Recollections of Marcus A. Root, after the lapse of sixteen years, are quite too indistinct and uncertain to set up a lost machine to defeat a valuable improvement, and deprive a meritorious inventor of the fruits of his toil and labor. Care should be observed in investigations of this nature, to guard the public against a growing propensity on the part of patentees, to expand their patents beyond what they ever invented, and at the same time, to protect them against the equally unjust claims of pretentious persons who always stand ready to prove that they are the real inventors of what has been patented to another. Neither have any merit, and both should be discouraged. Dates are with difficulty retained by a good memory, even when the inquiry has respect to recent events; but after the lapse of sixteen years, under the circumstances of this case, I do not think it safe to rely upon the unsupported statements of this witness. They are too uncertain, inconsistent, and contradictory. The statements of Philip Haas are no better, but in fact are less reliable. He contradicts himself, is contradicted by the circumstances, and by the testimony of the other witnesses in the case. An attempt is made to support his statements by the testimony of Enos B. Foster, but it can hardly be said to have that effect. When he went into the employment of the other witness he was but fifteen years of age, and they both admit that the alleged machine is lost. They do not attempt to testify to but one picture now in existence, taken with that machine. Their statement is that it was lost in 1850, and they afford no reason to infer that any of its parts are in existence. The theory is, that it was made by one Saxton, in 1840, under the directions of Philip Haas, and that it was stolen from the owner's

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place of business. But the proofs show that he never made another, and ever after used a machine constructed according to the old method. He gave a second deposition, and in that he states that he was mistaken; that it could not have been made as early as 1840, but thinks it was four years later. Complainant called a witness who worked for Philip Haas the latter part of 1846, and for the most part of 1847; and he states that he never saw any such machine in his shop, although he was an assistant operator and had the fullest opportunity to see all the models or machines in the apartments. He had for eleven months, as he states, the general charge of all apparatus and material, and everything that pertained to the business of his employer; and it is sufficient to say that his statements are utterly inconsistent with the testimony of the principal witnesses for the respondent. In view of the whole evidence, I am of opinion that the respondent has not proved, that the patentee in this case was not the original and first inventor of the improvement described in his reissued letters-patent. Having come to this conclusion upon the evidence, I do not find it necessary to determine the other questions of law discussed at the bar.

Decree for an account and injunction. Cause referred to a master to ascertain the amount of the damages.

D. H. FURBISH v. WILLARD SEARS.

Where a mortgage for the security of certain payments, as well as for the performance of a certain specified agreement, further provided that it should also become security for the performance of a certain other agreement, if the mortgagor should elect to perform the second agreement, *held*, that after election and notice by the mortgagor, such mortgage became security for the performance of the second agreement, as effectually as if the same had been set forth in the mortgage.

By the conditions of the mortgage, it was stipulated "that on nonpayment of certain instalments, the mortgagee was authorized to sell the mortgaged property at auction, giving thirty days' notice, the proceeds to be applied to the payment of the instalments overdue and unpaid; and if at any time after such disposal of the mortgaged estate, any other instalments shall become due, and remain unpaid ninety days, the agreement shall become null and void, and no further obligatory in any way on either party." *Held*, that the power to sell was merely cumulative, and did not debar the party from foreclosing the mortgage.

THIS was a writ of entry for the foreclosure of a mortgage, and the case came before the court upon an agreed statement of facts.

The following abstract from the statement is sufficient for an understanding of the case : —

The demandant and one J. B. Cahoon were the proprietors of certain letters-patent on a machine, or on an improvement on a machine, for sowing seed and fertilizing material broadcast. On the 15th of January, 1860, they entered into an agreement with the defendant and one Warren Sparrow, by which they contracted, in consideration of \$5,000, to sell to said defendant and Sparrow a certain number of machines made, and to be made, and delivered, as in said contract specified. The agreement was to continue in operation for six years, and was to embrace any and all improvements made on the invention within that period ; it was also to include the exclusive right of manufacturing a certain description of machines for a certain territory, as therein described. The conditions were that the purchasers were to keep an account of machines manufactured by or under them, and to pay a certain sum for each machine so made within that territory. The purchasers also covenanted to furnish security by mortgage on real estate in Massachusetts, to the amount of \$5,000, for the faithful performance of the unexecuted parts of the agreement. The agreed statement also showed that on the 17th of January, 1860, the defendant executed to the demandant the mortgage on which this suit was founded, in order to secure the faithful performance of the agreement. In the agreement was the following stipulation : " In case the party of the first part, on or before the 1st day of May next, shall elect to purchase the patent right for a certain territory, as specified by another agreement between the parties, of even date herewith, this agreement is to be cancelled, and all payments made under the same, are to be applied to, and constitute a part of, the payments stipulated for by such agreement, and the security of \$5,000 above provided for is to stand as security for the performance of such agreement." Such " another agreement," it must be observed, described as " of even date herewith," bore

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date on the following, and not on the same day, as the agreement in which it was thus referred to and described ; but the court said that they had both been duly executed before the execution of the mortgage deed ; and from the reciprocal references in each to the other, the identity of the second, as the one referred to in the first, was established beyond controversy. The court understood the counsel of the tenant as conceding that proposition, and as assuming that the court would adjudge that the second agreement, was the one referred to in the mortgage. It was provided in the first agreement that the second agreement should not become operative unless the party of the second part should, on or before the 1st of May then next, elect that it should be so, and give written notice of such election ; in that event, it was covenanted that " another contract, of even date herewith between said parties, shall be void, and the payment of \$ 5,000 cash, to be made under the other agreement, shall be taken as the cash payment provided for by this agreement ; and the security of \$ 5,000, to be given by the party of the second part to the party of the first part, shall be held by them as security for the faithful performance of this agreement."

C. T. & T. H. Russell, for demandant.

John S. Abbott, for tenant.

CLIFFORD, J. Undoubtedly it is competent for the court to look at the situation of the parties, and the surrounding circumstances, in order to ascertain the true intent and meaning of a written instrument. *Wilson v. Troup*, 2 Cowen. 200 ; *Barreda v. Silsbee*, 21 How. 147.

Viewed in the light of that principle, I have no doubt that the mortgage, after the party of the second part made the election and gave the notice, became a security for the faithful performance of the second agreement just as effectually as if the same had been fully set forth in the mortgage deed ; or, in other words, it is a mortgage to secure the conditions and stipulations of the second agreement. Among the conditions and stipulations, was one for the payment of certain semi-annual instalments of \$ 2,000, annexed to which is the following condition : " provided in case two of such semi-annual instalments shall be due and remain

unpaid, said party of the first part is hereby fully authorized and empowered to sell at public auction said security," giving thirty days' previous notice, &c., as therein required, the proceeds therefrom to be applied to the payment of the instalments overdue and unpaid. But the instrument further provides that, "if at any time after such disposal of the mortgage security, any other instalment shall become due, and remain unpaid ninety days from the date it becomes due and payable, the agreement shall become null and void, and no further obligatory in any way on either party."

The second proposition of the tenant is, that by the true construction of the agreement, if he paid the \$5,000 in advance, and gave up the mortgaged property, he was to be relieved from all further liability on the contract. Consequently he insists that judgment should be entered for the tenant, inasmuch as he has paid \$5,000, and the demandant may appropriate the mortgage security under the power of sale. The authority conferred however is an authority to sell the mortgage security, and it is very doubtful whether it can be lawfully exercised without selling the debt as well as the land; but it is unnecessary to decide that point, as I am clearly of the opinion that the power to sell, in this case, is only a cumulative power, and does not deprive the party from foreclosing the mortgage in the usual manner. 1 Hill. on Mort. (3d ed.) 129; *Walton v. Cady*, 1 Wis. 420; *Burdick v. McVanner*, 2 Denio, 170; *Shaw v. Norf. Co. Railroad Co.*, 5 Gray, 181; *Eaton v. Whiting*, 3 Pick. 491. The parties agree that there has been a breach of the condition of the mortgage, if it secures the second contract.

Pursuant to the agreement of the parties, a conditional judgment for possession is to be entered for the demandant, according to the law of the State and the practice of this court.

Unless the parties otherwise agree, the cause must be referred to an assessor to determine the amount of the conditional judgment.

THE UNITED STATES v. THE BARK ISLA DE CUBA. WILLIAM F.
DODGE, Petitioner. .

A master of a vessel, while in a foreign port, becoming convinced that it was the intention of certain persons on board to employ her in the slave-trade, brought the vessel to a port in the United States. When he arrived at the port for which he had sailed, he was towed into the harbor by a steamer, the master of which, learning from some person or persons on the vessel that she had been intended for the slave-trade, went, immediately upon landing, to the United States district attorney, gave information of the intended slaver, and made a sworn statement thereupon. The master of the vessel, on the following day, also gave the intelligence to the attorney, having, on the day previous, presented the ship's papers at the custom-house, and made known the facts to the revenue officers. After the decree of distribution awarding the prosecutor's moiety to the captain of the intended slaving vessel, and after the payment of the moiety in conformity to the decree, upon petition by the master of the steamer to open and set aside the decree of distribution, it was *held*, that the award had been properly made under the act of the 20th of April, 1818; and that this being the case, it was not necessary to decide whether it was competent for the court to open the decree and take jurisdiction of the second petitioner's claim.

THIS was a petition to open a decree of distribution, in a case of forfeiture of a vessel and cargo which had been equipped and prepared for the purpose of procuring negroes, and persons of color from a foreign country, to be held and disposed of as slaves. The decree of condemnation and forfeiture was entered September Term, 1864, in this district. (*Ante*, p. 295.)

The statement of the petitioner was, that he was the prosecutor in the case, and as such, was entitled to a moiety of the forfeiture, but that he was prevented by circumstances detailed in his petition, from presenting his claim prior to the decree of the District Court, where the prosecution was commenced. The decree of distribution awarded the moiety claimed by the petitioner, to the master of the vessel, Levi W. Turner, who brought the vessel into the port of Boston from the port of Saint Michael. The petitioner prayed to set aside the decree of distribution, to the end that he might have an opportunity to present his proofs to the court, and show that he was the only person entitled to a moiety of the forfeiture. Notice was served both upon the district attorney at the time of this petition, and upon his predeces-

sor in office at the time of the commencement of the proceedings against the vessel, and up to the final decree of distribution.

No claim was ever filed by the petitioner in this case, or in the court below, until after the appeal was made, but the claim was filed in the District Court, three days after the allowance of the appeal to this court. Nothing of the kind, however, appeared in the transcript of the record, nor was the attention of this court drawn to the matter until after the decree of distribution was made. The decree of the District Court was in all things affirmed.

Considerable delay ensued because the proceeds of the sale of the vessel had not been sent up with the transcript of the record, so that the decree of distribution was not made until the term previous to this one. The petition of Levi W. Turner was filed by the district attorney who filed the libel of information, and prosecuted the suit, but the matter was not adjudicated, until it had been referred to his successor in office, who reported that the facts stated in the record were true. The petitioner in this case complained that the matter was adjudicated before he was heard, but it appeared that the person who filed his petition in the court below was not a member of the bar, and no appearance was ever entered in the petitioner's behalf, until after the decree of distribution was entered and the money paid over to the parties therein named.

C. T. Russel and *H. A. Scudder* for petitioner.

R. H. Dana for the United States.

CLIFFORD, J. Two principal objections are taken to the claim of the petitioner by the district attorney.

It is insisted that he was not the prosecutor within the meaning of the act of Congress, and consequently, that he has no claim upon the merits of his petition; and also, that it is not now competent for the court to open the decree and take jurisdiction of the petitioner's claim.

The proofs show that the bark sailed from New York on the 12th of August, 1858, bound on a voyage to Loango on the coast of Africa. Her master at that time was Jonathan S. Dodson, and Levi W. Turner was the mate. She arrived at Fayal on the

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2d of September of the same year, and remained there in the stream some eight or ten days. During the voyage the suspicions of the master had been aroused that certain Portuguese or Spanish passengers intended to control the voyage, and that the real purpose of it was to engage in the slave-trade. Accordingly he directed the mate to examine the casks in the lower hold, and see what they contained. The supercargo's documents showed that there were twenty-two thousand gallons of fresh water on board; and upon an examination of the casks which had been shipped as oil casks, enough was ascertained to warrant the conclusion that the statement of the documents was true. Without entering into details, suffice it to say that the cargo was made up of such articles as are usually found in vessels clandestinely intended for that traffic, and was of a character fully to justify the suspicions of the master. They arrived at Saint Michael on the 12th of September, and remained there till the 22d of the same month. While there, they discharged twenty-seven bales of dry goods, and the passengers took on board ten bags of beans; and it was during the time the vessel lay there that the master communicated his suspicions to the mate. He was to receive pay at that port, and he told the mate that when he got his money, he should leave the ship, give him a letter, and order him home with the vessel, and distinctly informed him that he suspected it was an illegal voyage. The record also shows that the mate was appointed master with the approval of the consul, and that the master, who was sick, left the vessel. His directions were that the mate should return to New York, and he advised him to keep all his papers out of the way, so that they might not be stolen by the passengers. The vessel sailed from Saint Michael on the 22d of September, Levi W. Turner, master, and when three days out, he called all hands, and stated to them that he suspected that the voyage was illegal, and that he was going to return to the United States, as advised by the former master. Some of the passengers shed tears, and wanted him to run into Flores, and put them ashore. They offered him \$1,000 if he would do so, but he declined, saying that he would not go any nearer the land than he was. Willing to be rid of them, how-

ever, he offered them a boat of four or five tons ; and they left in her, taking with them their trunks, one or two bales of goods, and some provisions. Considering them dangerous, he allowed them to leave, and, perhaps, it is not going too far, to say that the circumstances afforded some justification for his course, as they had small arms aboard, such as muskets, swords, and cutlasses, and plenty of means to bribe the crew, if any had been wicked enough to listen to such overtures.

Faithful to his duty, the master brought the vessel to the United States, and, finding it more convenient, he sailed for this port. The petitioner in this case towed the vessel into the harbor, and in the course of his employment learned from the seamen that the voyage was regarded as an illegal one. He had no knowledge upon the subject, or means of knowledge, except what he derived from the crew. Beyond doubt he performed his duty in towing the vessel into the harbor properly, and when that was done, he at once repaired to the office of the district attorney and communicated the facts which he had learned on board the vessel, but he had none of the papers belonging to the vessel, and no personal knowledge upon the subject. Instead of going immediately to the office of the district attorney, the master, as was his duty, went to the custom-house and presented his papers there, and made known the circumstances to the proper revenue officers. On the following day he called upon the district attorney, and, through the proper officer of the customs, the papers were placed in his hands. The statement of the petitioner is, that the district attorney, when he called on him after leaving the vessel at her anchorage, took down in writing the facts stated by him, and caused him to make oath to the same, and that the district attorney thereupon commenced proceedings against the bark and her cargo. Recurring to the libel, however, it will be seen that it is in the usual form, and is signed only by the district attorney. But that is of little importance, as it appears that the master was ever after recognized by the government as the prosecutor, and is in fact the person who furnished all the evidence to sustain the libel of information. .

By the act of Congress of April 20, 1818, one moiety of such

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a forfeiture is granted to the use of the United States, and the other to the use of the person or persons who shall sue for such forfeiture, and prosecute the same to effect. 3 Stat. at Large, 451. Take the facts as stated, and it is not possible to say that the petitioner sued for the forfeiture or prosecuted the same to effect. Even if the moiety was given to an informer, and not to the prosecutor, strong doubts are entertained whether the petitioner would justly be entitled to the claim in preference to the master. He had no knowledge upon the subject, except what he had derived on board the vessel, and all of that which was reliable emanated from the master. Suppose one of the crew, while the master was going to the custom-house, had left the vessel and first communicated the fact to the district attorney, would he have been entitled to claim the moiety? I think not, even if the law gave it to an informer, as his conduct, in the case supposed, would be a fraud upon the master, and consequently would not be upheld by the courts. But whether so or not, it is clear in this case, and in my judgment, beyond all doubt, that the master was the person and the only person, who could properly make the claim.

Entertaining no doubt upon the subject, I do not find it necessary to consider the other question.

The prayer of the petition is denied.

CHARLES L. GARDINER *et als.* v. THOMAS HOWE.

Where the defendant, an American citizen, had, without license, used the patented improvement of the plaintiff, on the high seas, on board an American vessel; *held*, that the plaintiff was entitled to recover damages for such use of his invention the same as if it had taken place within the territory of the United States.

THIS was an action on the case to recover damages for the alleged infringement of a patent right. At a previous term the parties went to trial upon the pleadings in the case, and the jury,

under the instructions of the court, returned a verdict in favor of the plaintiff. At this time the defendant moved for a new trial, and alleged the following reasons:—

First, because of the misdirections of the court. Second, because the verdict was against the evidence, and the weight of evidence in the case.

The patent was on an improvement in the sails of vessels. The defendant was owner of the bark Robert, and the master applied the patented improvement to one of the sails of the vessel, on her passage from Liverpool to New York. She was an American vessel, and commanded by an American master. The evidence showed that the improvement was applied to the sail on the high seas, and without the jurisdiction of the United States. Some of the statements of the witnesses tended to show that the master used the improvement but once, and never after the vessel arrived within the jurisdiction of the State of New York, but other statements of the same witnesses showed that the sail, with the patented invention still on it, remained on the vessel, and in a condition for use, even after the voyage was terminated, and while the vessel was at the wharf in her port of discharge. Evidence was also introduced to show that the defendant authorized the master to use the invention on his vessel, and clearly showed that he suffered the same to remain on the sail, after he had knowledge of its use, without giving any directions that it should be removed.

The defendant contended that the plaintiff was not entitled to recover, even if he proved the use of the patented improvement as alleged, because the case showed that the use was only on the high seas, and consequently, that it was not prohibited by the patent law.

At the trial the court gave the two following instructions to the jury:—

First, that if the jury found that the use was continued into the port of destination, then the reasoning of the defendant would not apply. Second, that the position, in any view of the evidence, could not be sustained if they found the use was

without license, as it was on an American vessel bound to an American port.

Samuel Snow, for plaintiffs.

F. A. Brooks, for defendant.

CLIFFORD, J. Reference is made by the defendant to the case of *Brown v. Duchesne*, 2 Cur. 371, and *Same v. Same*, 19 How. 183; but these cases do not apply where, as in this instance, the vessel where the act of infringement took place, was American. Were it to be held that in cases like the present the plaintiff is not entitled to recover, patents for improvements in the tackle and machinery of vessels, or in their construction, would be valueless. The patent laws of the United States afford no protection to inventions beyond or outside of the jurisdiction of the United States; but this jurisdiction extends to the decks of American vessels on the high seas, as much as it does to all the territory of the country, and for many purposes is even more exclusive.

The motion for new trial is entirely without merit, as the evidence shows that the plaintiff is clearly entitled to recover. Motion overruled. Judgment on the verdict.

MAINE DISTRICT.

SEPTEMBER TERM, 1865.

THOMAS TRECARTIN, Libellant, v. SHIP ROCHAMBEAU. JOHN E.
DONNELL, Claimant, Appellant.

The plaintiff, in 1863, shipped at St. John, New Brunswick, on board an American vessel, for a specified voyage, at an agreed rate of wages per month, viz., "\$25 per month," the said voyage to terminate in the United States. It was contended that the plaintiff was entitled to an amount, in the currency of the United States, equal to the value of the contract price in this country, if paid in the currency of St. John. *Held*, There was no question of the relation of one currency to another involved in the case; the contract for wages being expressed in dollars and cents, and the payment to be made in this country, the plaintiff could recover no more than the amount specified in the contract.

THIS was a libel in a cause of subtraction of wages, civil and maritime, and the case came before the court on appeal from a decree of the District Court for this district.

The libellant was the second mate of the ship Rochambeau, and the libel was *in rem* against the ship, to recover a balance of wages, claimed by the libellant, which the master and owner refused to pay. The libellant shipped at Saint John on the 27th of April, 1863, and was discharged at the port of Portland on the 7th of July, 1864, having, therefore, served fourteen months and seven days. He alleged the contract to be, that he should be paid \$25 per month in St. John currency; and the balance claimed as due was \$201.50.

The terms of the shipping articles were for a voyage "from St. John to London, from thence where freight or charter may offer, or as the master may direct, for a period of time not exceeding nine months, voyage to end at a port in the United States."

The shipping articles were signed at St. John, but the sum specified as the rate of wages was expressed in decimals, and not in St. John currency, as alleged in the libel; as there

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expressed, the rate of wages was "twenty-five dollars per month" with \$25 advance; and there was no evidence that the libellant was entitled to or expected any higher rate.

Under the shipping articles the libellant went to London and back to the port of departure; and the period of service for which he shipped not having elapsed, he went a second voyage to the same port, without signing any new articles or making any new agreement as to service or wages. Exhibits attached to the libel showed that the second voyage was by the way of Newport, in England, and that the ship went to the Mediterranean before she returned to Portland.

It was agreed that the ship was an American vessel, and the libellant a citizen of the United States.

The vessel returned to the port of Portland on the 7th of July, 1864, and delivered a cargo of salt. The libellant faithfully performed his duty as second mate from the time he shipped until his discharge; and it was conceded that he was entitled to his wages as specified in the shipping articles, deducting the several payments made, namely, at St. John, London, Newport, Malta, and Trapani.

It was agreed that those several payments were made in the currency of those ports; that is, in bills at St. John, and in gold and silver at the other places, and that they amounted in all to \$213.50.

The wages of the libellant for the entire period of his service amounted to \$356.25, leaving a balance due him of \$142.75 at the time of the discharge.

In the District Court, a decree was entered that the libellant was entitled to recover, as the balance of his wages, \$154, to be paid in specie, or its equivalent, or \$308 in United States currency, with costs, and that execution should issue for that sum with costs of suit. From this decree the claimant appealed.

J. O'Donnell, proctor for libellant.

Evans and Putnam, proctors for respondent.

CLIFFORD, J. The principal objection to the decree, as urged by the claimant, is, that the alternative amount awarded to the libellant is double the amount found to be due him in specie, and

that it authorizes execution to issue against the stipulators for the alternative amount. The right of the libellant to recover is not disputed, but it is insisted that he is bound by his contract, and that he is not entitled to any greater sum than is therein specified.

The terms of the contract for the first voyage are as plain as they can be expressed in our language.

They are "twenty-five dollars per month"; and it was especially stipulated that the voyage was to end in a port of the United States. Such were the terms of the original contract; and I concur with the district judge that the circumstances show that the libellant continued in the ship throughout the period of service at the same rate of wages. When the ship returned from the first voyage, the period of service had not expired; and inasmuch as the libellant went the second voyage without any objection by either party, and without any new contract, it must be understood that the same rate of wages was to be continued. Undoubtedly both parties so understood the arrangement, as all the partial payments were adjusted on that basis. Owners of the vessel agreed to pay \$25 per month, and they agreed to pay nothing more, and both parties are bound by the terms of the contract. Looking at the case in that point of view, the question presented is not in what currency the libellant is to be paid, but how much he is entitled to recover.

He contracted for \$25 per month, and it is not possible for the court to give him any more without assuming to make a new contract. The theory of the libellant is, that he is entitled to a decree for double that amount, because the contract was made at St. John, and because the currency of that place was selling in the market here, at the time the libellant was discharged, at a corresponding advance in legal-tender notes of the currency of the United States. But the theory cannot be sustained for several reasons: 1. Because it assumes that the execution when issued will necessarily be satisfied in our paper currency, whereas the marshal may levy the same upon the gold or silver currency of the stipulators. 2. Because it assumes that a dollar here is worth less than a dollar where the contract was executed, of

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which there is no proof in the case, unless it be assumed that a dollar here necessarily means a dollar in paper currency, which cannot be admitted. 3. Because it is utterly inconsistent with the terms of the contract which alone furnishes the rule of decision. The words of the contract are, "twenty-five dollars per month," and it is not possible to allow any greater sum without introducing a new provision, to which the parties have not assented. There is, therefore, no question of the relation of one currency to another involved in the case, and it is wholly immaterial whether the contract is governed by the law of the place where it was made or by the law of the place where it is to be performed, as in either view of the question the result must be the same.

Where the contract for wages is expressed in dollars and cents, and the payment for the service is to be made here, it is clear that the party entitled to wages can recover no more than the amount specified in the contract; and in such a case it makes no difference where the contract was signed or what may be the state of exchange. Decree of the District Court must, therefore, be modified in conformity to this opinion. Libellant is entitled to a decree for the sum of \$ 142.75, with interest from the time of his discharge to the present time, with costs in the District Court. Appellant to recover no costs, except the proper charges of the clerk.

MASSACHUSETTS DISTRICT.

OCTOBER TERM, 1865.

ABBY R. LORING *et al.* v. LEVI H. MARSH *et al.*

In cases depending on the statute of a State, and more especially in those relating to titles to lands, the Federal courts adopt the construction of the State courts, when such construction is settled or can be ascertained; but if the question has not been decided, then the duty of construction devolves upon the tribunal where the case is pending.

A testatrix, after certain minor bequests, devised all the rest, residue, and remainder of her property to two trustees, or the survivor of them, their heirs and assigns forever, to hold, manage, and invest the same according to their best discretion, and to pay over the net income to her three children in equal shares. Upon the decease of any one of the children, the share which such one would have taken, if alive, was to be divided between the surviving two; upon the decease of two of them, the survivor to have one half of the whole income during such survivor's life. Upon the decease of all the children, the trustees, or their successors, were to appoint three gentlemen to determine how, by payments to permanently established incorporated charitable institutions, the whole property might be disposed of for the benefit of the poor. After the decease of the three donees under the will, — two without issue, — the children of the other, which children were born before the will was made, as the sole heirs at law of the testatrix, brought a bill against the survivor of the trustees (when the provisions of the will relating to charitable institutions were about to be carried into effect by said trustee), praying for an account, and a decree that said trustee should transfer the property to the complainants, and alleging the trusts to be illegal and void; that they could not be executed; that they had ceased and determined; and that the intention of the testatrix to bestow the property upon charitable institutions was never perfected. *Held*, that the case showed no unintentional and accidental omission of the complainants in the will, which is requisite under the Massachusetts statute of wills, as construed by the courts of that State, to constitute the foundation of the relief prayed for, and that complainants were not entitled to a decree. *Held*, also, that the power conferred upon the trustees to appoint a committee who should designate the disposition to be made of the property, after the death of all the testatrix's children, was one coupled with an interest which could be exercised by the surviving trustee, and not a mere naked power to two, which could not be exercised by one of them. *Held*, also, that it appeared that the intention of the testatrix to give the property for the benefit of the poor, had been legally carried into effect.

Review of the decisions of the Supreme Court of Massachusetts upon the 26th section of the State statute of wills. Children are omitted in the will, in the sense of this statute, when no legacy is given them, and they are in no manner mentioned; grandchildren, where it appears that their father died before the execution of the will, stand in the same position; and posthumous children fall within the same category, because they are within the express words of the colonial statute of May, 1718, as well as under the decia-

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ion of the State courts, children born after the date of the will and before the death of the testator.

The courts of the United States cannot exercise any equity powers except such as are conferred by an act of Congress, and those judicial powers which the High Court of Chancery in England, under its judicial capacity as a court of equity, possessed and exercised at the time of the formation of the Constitution of the United States.

Powers not judicial, exercised by the Chancellor as the representative of the king's prerogative, are not possessed by the Circuit Courts.

The prerogative power belonging to the sovereign has not been delegated to the Federal government, but remains in the several States, to be exercised according to the laws and usages there prevailing.

THIS was a bill in equity brought to set aside certain provisions in the will of Abigail Loring, formerly of Boston, deceased, and to enforce the rights of the complainants as heirs at law of her estate. The complainants were Abby R. Loring, Marion W. Loring, Elijah J. Loring, children of Josiah Q. Loring, deceased, who was the son of the testatrix. The will was dated October 19, 1858; and the pleadings showed that at that time the testatrix had three children, namely, Abby M. Loring, Cornelia W. Thompson, and Josiah Q. Loring. After certain legacies not material to be noticed, the testatrix devised "all the rest, residue, and remainder of her estate and property, real and personal, unto Levi H. Marsh and Samuel E. Guild, to have and to hold the same to them, and the survivor of them, and their and his heirs and assigns forever to their own use, but in trust to, under and for the following uses, purposes, trusts, and limitations, namely, to hold, manage, invest, and reinvest the same according to their best discretion, and to pay over one third of the net income therefrom" to each of her before-mentioned three children, during their respective lives. Provision was also made in the will that "upon the decease of my said children, severally, the shares of said income, which they would continue to take if living, shall be retained and invested by the trustees, until the decease of my last surviving child, and shall then, with the principal or trust fund, be disposed of for the benefit of the poor in the manner" therein provided.

All of the complainants were born before the date of the will, and it is to be observed that provision was made in the will for their father, then living.

The record showed that Cornelia W. Thompson, one of the daughters of the testatrix, died on the 10th of June, 1859, without issue, and that on the 14th of July following, the testatrix made a codicil to her will, giving the whole of the said income, under the conditions and provisions contained in the will, to her two surviving children, in equal shares, during their joint lives, and one half to the survivor of them during his or her life.

Josiah Q. Loring died on the 6th of April, 1862, and Samuel E. Guild, one of the trustees, died on the 16th of July in the same year. The testatrix died on the 8th of November, 1862, leaving her will as originally executed, except as modified by the codicil above mentioned. Her remaining daughter, Abby M., died on the 22d of June, 1863, unmarried; and Peter Renton, one of the respondents, was appointed administrator of her estate.

The claim of the complainants was, that they were entitled, as heirs at law of her estate, to one half of the property, real and personal, mentioned in the will of the testatrix. The claim was based upon the following grounds: —

First, that, being the issue of a deceased child of the testatrix, they should take the same share of the estate that they would be entitled to if the testatrix had died intestate, because the testatrix, on the facts exhibited in the record, omitted to provide for them in her will within the meaning of the twenty-fifth section of the Massachusetts statute of wills.

Second, that the surviving trustee could not lawfully execute the power directed by the will as the sole means of designating the objects of the testatrix's bounty, because it was not a power to select or appoint the donees of the property, but a mere naked authority to nominate, appoint, and instruct persons who were to act for her in that behalf, in making such selections.

Third, that the conclusion of law upon the whole case was, that the intention of the testatrix to give the property to charitable institutions was never perfected, and consequently that they were entitled to their distributive shares in the same as heirs at law.

The respondents contended that the case did not come within the provision of the State statute of wills; that the surviving

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trustee might execute the power to select and appoint the committee provided for in the will ; and that the particular bequest in question was valid by the laws of the State of Massachusetts.

Caleb Cushing, B. R. Curtis, and Hutchins and Wheeler, for complainants.

Mrs. Loring's only son died April 6, 1862, leaving the complainants his sole heirs at law ; and Mrs. Loring herself died November 8, 1862, without making any codicil to her will, after the decease of her son, and consequently, without naming the complainants, her grandchildren, in the will, or in any codicil ; and as the provision made by the will and codicil for their father was limited to his life, and lapsed by his death in the lifetime of his mother, Mrs. Loring omitted to provide for the issue of her deceased son ; and the first question is, whether they are not entitled to the same share of her estate as they would have been, had Mrs. Loring died intestate, by force of c. 92, § 25, Gen. Stats. of Mass.

The time to which the question of omission applies is the time of Mrs. Loring's decease. Not having then made any provision by her will or any codicil for the issue of her deceased son, the case of the statute arises. She had made a will and left issue of a deceased child, without having made any provision for them. *Bancroft v. Ives*, 3 Gray, 367.

This is the case of a son, born after the making of the will. It cannot be distinguished from the case of grandchildren, who became the issue of a deceased son, and so within the statute, by the death of their father after the making of the will.

It does not appear that such omission was intentional, and was not occasioned by accident or mistake.

The evidence of intention to disinherit an heir should be such as to leave no reasonable doubt of the existence of a formed and settled intention. The common law always favors the heir, and one of its rules is, that an heir cannot be disinherited, even by a will, unless there are express words or a necessary implication to that effect. 5 Cru. Dig. 136.

A fortiori where the disinheritance is to be effected by parol evidence of mere declarations of the testator.

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It is the office of such evidence to supply the omission of a clause in the will declaring the intention of the testator to disinherit the heir. *Wilson v. Fosket*, 6 Met. 400.

It is like the proof of the contents of a lost will by parol evidence, and the courts have held that this requires "the clearest and most stringent evidence." *Davis v. Sigourney*, 8 Met. 487.

If what was actually written, in a duly executed will, cannot be proved to disinherit the heir but by "the clearest and most stringent evidence," *a fortiori*, the heir cannot be disinherited by an intention never written at all, unless such intention shall be made out by "the clearest and most stringent evidence."

The true inquiry is this: —

Does it appear, by the clearest and most stringent evidence, that the testatrix had formed a settled intention to disinherit the children of her deceased son, and that by reason of such intention they were not named in her will or its codicil?

The testatrix executed a will and a codicil before the decease of her son. These were ambulatory, and whether she intentionally omitted the complainants from them is not material, as no case under the statute then existed. And an intention to disinherit either children born after the making of a will, or the issue of a child dying after the making of a will, cannot be proved by parol. It can be manifested only by making another will or codicil, from which the person is intentionally omitted.

The other branch of this case depends on other facts and principles.

By her will, Mrs. Loring devised the residue of her estate to Levi H. Marsh, one of the defendants, and Samuel E. Guild (who died in the lifetime of the testatrix), in trust to pay one third of the income of the property to each of her children during his or her life; and, upon the decease of the last surviving child, the trust fund was to "be disposed of for the benefit of the poor in the manner hereinafter provided."

"It is my will that when, upon the decease of all my children, the trust fund is to be disposed of as aforesaid, the said Marsh and Guild, or their successors as trustees, shall select and appoint three or more gentlemen, who shall be informed of the

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facts by the trustees, and shall determine how, by the payment to permanently established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect, and my gift may be made most productive of benefit to the poor; and that thereupon the said trust fund (including the said shares of income retained) shall be disposed of, and paid over in accordance with the determination of the said gentlemen, certified in writing to the trustees."

Marsh alone could not execute this power to appoint the persons who were to designate the institutions which were to receive the property, and inform them of the facts needful to guide or influence their judgment in the selection.

This was not a power to appoint or select the donees of the property, nor to appoint the uses of the property. It was not a power over property. It was a naked authority, to nominate and appoint persons, who were to act for the testatrix in choosing the objects of her bounty, and to make known to them such facts as the two trustees should judge to be proper to guide or influence their judgment in the selection.

It was a power to appoint persons, and not a power to appoint property; and from the nature of the case must be a mere naked power, in contradistinction to a power coupled with an interest. A power coupled with an interest means coupled with an interest in the property which is the subject of the power. *Hunt v. Rousmanier*, 8 Wheat. 174; and where, as in this case, property is not the subject of the power, the power cannot be coupled with an interest.

A naked power to two persons by name cannot be executed by one. *Peter v. Beverly*, 10 Pet. 564; 1 Sug. on Powers, 144; 2 Story's Eq. § 1062 and cases cited.

The intention of the testatrix to give this property to charitable institutions was never perfected. She intended to speak only through persons selected and informed by both Marsh and Guild. There being no such persons, there is no expressed will of the testatrix in behalf of the institutions which are respondents. *Fountain v. Ravenel*, 17 How. 369.

The power exercised by the chancellor to make *cy pres* appli-

cations of charitable bequests is not a judicial power, and does not exist in any court of Massachusetts. *Wheeler v. Smith*, 9 How. 55; Constitution of Mass. Part. I. Art. XXX; *Fontain v. Ravenel*, 17 How. 369.

There being no mode consistent with the will of the testatrix, of ascertaining the objects of her bounty, there is a resulting trust in favor of the complainants, who are her heirs at law.

Nor is there any trust created by the will in favor of any particular person who would have a right to call for the execution of the power. The creation of the trust was to follow the execution of the power.

Nor could the attorney general file a bill, because no trust in favor of charity has been created or brought into existence. The English law not in force in Massachusetts.

The case of *Moggridge v. Thackwell*, 7 Ves. Jun. 36, was decided against Lord Eldon's own views, and merely on the strength of precedents not binding here. *Mills v. Farmer*, 1 Meriv. 100; Boyle on Ch. 18 - 23; *Fontain v. Ravenel*, 17 How. 369.

Nor can the court appoint some person to join Marsh in executing the power.

Though the court may appoint a trustee, it will not appoint a person to execute a naked discretionary power of appointment of persons, who are to execute a power over property. Even the English courts, in charity cases, have not gone so far as that.

The court itself executes the power, because it cannot appoint persons to execute it.

If such a person should be appointed, he would not be a successor to Guild, who never was a trustee.

S. Bartlett, *F. C. Loring*, and *C. W. Loring*, for respondents.

The present case does not come within the statute of Massachusetts, which provides that when a will makes no provision for a child or the issue of a deceased child, they shall be entitled to a share of the estate, unless it appears that the omission was intentional.

The will and codicil do provide for all the children of the testatrix living at their respective dates; and there was then no issue of a deceased child.

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The law proceeds upon the presumption that when such omission is made it is unintentional; but this cannot be presumed when there was in fact no omission made at the time. In relation to children born after the will is made, the case is different, because that case falls expressly within the letter and spirit of the statute.

It is otherwise with reference to those who become the issue of a deceased child after the will is made, but who were in being before it was made, and for whose parent provision was made by the will. With regard to them, the will when made was perfectly good; and if their father had survived the testatrix, they could have claimed no interest. The statute does not provide that in case of the decease of a child for whom provision was made, the testator shall be considered as having deceased intestate as to his issue.

But supposing the provision for all the children living at the date of the will and codicil is not sufficient, then, in cases like this, where the child dies before the testatrix, leaving issue, the statutes (Gen. Stats. c. 92, § 28) expressly provide that the issue take the devise of real or personal estate made to the child.

The issue being provided for in this manner, cannot also come under the provisions of section twenty-five.

This succeeding section controls the provisions of section twenty-five, as the issue of a deceased child cannot both take the devise to its parent and a full proportion of the estate; it must be one or the other, as both could not be intended, and may be impossible. The latter section, which provides for all cases where, after a devise to him, a child dies leaving issue, shows that it was not considered that such a case had been provided for by the preceding section, or it takes it out of the class of cases therein provided for.

The mention of the father in the testatrix's will and codicil, the devise to him for life, the disposal of the principal afterwards to others, and the other provisions of the will, are evidence that the issue of the father mentioned were in the mind of the testatrix, and that the omission was intentional and not by accident or mistake.

In the construction of the statutes in force before the Revised and General Statutes, the Supreme Court of Massachusetts held that the question was a matter of intent. They came to this conclusion, although the statute of 1783, c. 24, giving a child without a legacy, a proportion of the estate of its parent, did not have the provision of the present statute as to the omission being intentional and not occurring by accident or mistake. And the court decreed in *Church v. Crocker*, 3 Mass. 17, that a devise to the children of a son proved that the parent was in the contemplation of the testatrix, and that therefore he could not claim a distributive share.

So in *Wild v. Brewer*, 2 Mass. 570, devise to grandchildren of daughter Sarah, was sufficient to show Sarah was in mind.

Also *Terry v. Foster*, 1 Mass. 146.

And in *Wilder v. Goss*, 14 Mass. 357, the mention of a son-in-law and a legacy to one grandchild, was held as raising an inference that the other grandchildren were not forgotten.

A fortiori, a devise to a father shows that his children are not forgotten.

If the legacy had been one cent to the father, his issue would have taken it, by statute, and the omission to notice the grandchildren would be held to be intentional. It makes no difference, in fact, as far as the grandchildren are concerned, whether the legacy to their father is this nominal one or a devise for life.

By a devise for life to the father it is shown that he and consequently his family were in the testatrix's mind. By limiting the devise to the life of the father, and then giving the estate on his death to other persons in trust for the poor, the testatrix as expressly says that she does not mean the grandchildren to be benefited by her estate, as if she in words had declared it.

The whole question is, whether from the will the inference is to be drawn that the omission was intentional, and not occasioned by accident or mistake.

In *Wilson v. Fosket*, 6 Met. 403, the court says the construction under the old law has been that whenever from the tenor of the will, or from any part of it, sufficient appeared to indicate that the testator had not forgotten his children or grandchildren (as

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the case might be) when he made his will, they would not be entitled to a distributive share of his estate, although no legacy was given them by the will. This principle, already adopted by the court, was also adopted as a statute provision by adding the words now contained in the General Statutes.

In *Converse v. Wales*, 4 Allen, 512, evidence of wills previously made having the omission of the same grandchildren, was admitted to show intentional omission.

If it does not appear by the will itself that the omission was intentional, it may be shown by parol evidence. *Wilson v. Fosket*, 6 Met. 400.

In administering the law in relation to charities, the United States courts are governed by the local law of the State, in the same manner as in relation to real estate.

The prerogative power belonging to the sovereign has not been delegated to the Federal government, but remains in the several States, and is exercised according to the usages or laws prevailing in each, and of course varying in every State; and whenever, by reason of citizenship or otherwise, a cause is brought before the United States courts touching the validity of a gift to charitable uses, the question to be considered is, whether it would be held valid or not by the courts of the State. Such has been the uniform doctrine of the United States courts from the beginning to the present day. *Philadelphia Baptist Association v. Hart's Ex'rs*, 4 Wheat. 1; *Beatty v. Kurtz*, 2 Pet. 566; *Inglis v. Trs. Sailor's Snug Harbor*, 3 Pet. 99; *Vidal v. Girard's Ex'rs*, 2 How. 127; *Wheeler v. Smith*, 9 How. 55; *Fontain v. Ravenel*, 17 How. 369.

"The wide discretionary power which the chancellor of England exercises over infants, lunatics, or idiots, or charities, has not been conferred." These prerogative powers, which belong to the sovereign as *parens patriæ*, remain with the States.

"In a suit by an heir, a representative of the testator, to recover property or money bequeathed to a charity, the court must of necessity examine whether the bequest was valid or not by the laws of the State."

There is no conflict of authorities on this point. The question

is then presented whether or not this bequest is valid by the laws of the State of Massachusetts. If it would be maintained by the courts of that State, it must be here.

The control of the legislature as *parens patriæ* over the administration of charities, has been constantly exercised from the earliest date to the present, and jurisdiction over them vested in its courts.

In ancient Charters, page 52, will be found an act passed in 1641, respecting benevolent or charitable donations, by which it was ordered that all gifts and legacies to the colleges, schools of learning, or other public use, shall be faithfully disposed of according to the intent of the donors, and the persons entrusted therewith are required to account to the county courts. See also Statute 1785, c. 51 ; Revised Statutes, c. 40, § 39, &c. ; Statute 1847, c. 213 ; Statute 1849, c. 186, § 8 ; Statute 1855, c. 302.

By the General Statutes, c. 14, § 20, it is made the duty of the attorney general to "enforce the due application of funds given or appropriated to public charities."

By chapter 113, sections 1 and 2, the Supreme Court is vested with the whole jurisdiction of the English Court of Chancery. *Hadley v. Hopkins Academy*, 14 Pick. 240. See pages 253, 262. *Going v. Emery*, 16 Pick. 114 ; *Burbank v. Whitney*, 24 Pick. 146 ; *Bartlett v. Nye*, 4 Met. 378 ; *Washburn v. Sewall*, 9 Met. 280 ; *Sohier v. St. Paul's Church*, 12 Met. 250 ; *Brown v. Kelsey*, 2 Cush. 243 ; *Winslow v. Cummings*, 3 Cush. 358 ; *Bliss v. Am. Bible Society*, 2 Allen, 334 ; *Sanderson v. White*, 18 Pick. 328.

These cases establish the equitable jurisdiction of the Supreme Court over charities in its fullest extent ; that the statute of Elizabeth is a part of the common law of this State, and that it is the settled law of this State that an appropriation of property to charitable uses will be upheld ; that it is no objection that no person is named capable of taking the legal interest ; that the court will supply the place of a trustee, and will sustain and protect such a gift whenever it is consistent with public policy and local laws, and the intention of the donor can be accomplished ; and if it cannot be literally carried into effect, will accomplish it as near as possible.

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The intent of the testatrix is explicit and legal, and can be accomplished, and has been carried into effect, in the mode designated by her.

The object of the testatrix was to benefit the poor, — an intent not inconsistent with public policy or local laws.

The mode in which that intent was to be effected was by distributing the trust fund among established, incorporated, charitable institutions.

The trust has been performed, the committee have been selected ; they have performed the duty, and designated various institutions, having the qualifications required by the testatrix, to receive various sums of money.

The only objection can be that the will does not designate the objects of her bounty.

To this it may be answered : first, that being a gift to charitable uses, the courts of Massachusetts will carry out the intent and effect of the will ; second, that the law considers as certain and definite that which can be made so, and that the will expressly provides for ascertaining with precision the objects of the bounty ; third, that the courts of Massachusetts have frequently sustained gifts to charitable uses, where the objects of the bounty were as uncertain as here. *Hadley v. Hopkins Academy*, 14 Pick. 240 ; *Going v. Emery*, 16 Pick. 107 ; *Brown v. Kelsey*, 2 Cush. 244.

Bequest of money, the income to be appropriated for the support of evangelical preaching by such ministers as shall be approved by a majority of the members of the Middlesex Union Association.

Devise of residue for the promotion of such religious and charitable enterprises as shall be designated by a majority of the pastors composing said association.

Both held good as against the heirs at law.

The statute of Elizabeth being a part of the common law of this State, and the laws regulating charitable uses being the same with those of England, the decisions of the English courts are authorities here. *Attorney General v. Hickman*, 2 Eq. Ca. Abr. 193 ; *Attorney General v. Syderfen*, 1 Vern. 224 ; S. C. 7 Ves. Jun. 9 ; *Baker v. Sutton*, 1 Keen, 224 ; *Horde v. Earl of Suffolk*, 2 Myl. & K. 59 ; *Moggridge v. Thackwell*, 7 Ves. Jun. 68.

The trust or authority vested in the named trustees, Marsh and Guild, to select and appoint a committee to determine what charitable institutions should receive the fund, was well executed by the survivor.

The trust or authority was not personal, as it was to be exercised by those named or their successors; it could not be executed till the last of the children of the testatrix should decease,—an uncertain and probably remote period, before which it was possible if not probable, that the trustees named might decease. It was therefore provided that it should be exercised by their successors.

It is well settled that a power given to trustees survives, and has been so for many years. *Butler v. Bray*, Dyer, 189; *Attorney-General v. Gleg*, 1 Atk. 356. See *Moggridge v. Thackwell*, 7 Ves. Jun., 68; Lewin on Trusts, 299.

In this case the trustees had an interest; the whole legal estate was vested in them, subject to the trust.

As the question arises under a will made and established in this State, creating the trust now under consideration, the statutes of this State and decisions of its courts must furnish the law for this court, in relation to the appointment of trustees and the administration of the trust. See *Greene v. Borland*, 4 Met. 330; *Dixon v. Homer*, 12 Cush. 43.

If the devise was originally good, the property is wholly given away from the heirs. *Sanderson v. White*, 18 Pick. 328.

CLIFFORD, J. Obviously the first question involved is the construction of the statute of wills, and therefore is a question of local law. The universal rule is, in cases depending on the statute of a State, and more especially in those respecting the titles to lands, that the Federal courts adopt the construction of the State tribunals when that construction is settled or can be ascertained. Where the construction is settled by the State court, the rule is, that the Federal courts will follow that construction; but when the question has not been decided by the State court, then the duty of ascertaining the true construction in the particular case is necessarily devolved upon the tribunal where the case is pending. The language of the provision under consideration is as follows: "When a testator omits to provide in his will for any of

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his children, or for the issue of a deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate, unless they shall have been provided for by the testator in his lifetime, or unless it appears that such omission was intentional, and not occasioned by accident or mistake." Mass. Gen. Stat. (1860) c. 92, § 25, p. 478. The same provision, and substantially in the same words, is contained in the statutes of the State, called the Revised Statutes, passed twenty-four years earlier. Indeed the substance of the provision as held by the courts, may be traced back to colonial times. The colonial statute of 12 William III., passed in the year 1700, provided in its second section that any child or children, not having a legacy given them in the will of their father or mother, shall have a proportion of the estate of their parents given and set out unto them as the law directs for the distribution of the estates of intestates, provided such child or children have not had an equal proportion of his estate bestowed on them by the father in his lifetime. The preamble of the section refers specially to the fact also that many children are born after the making of the will, showing conclusively that after-born children, as well as those omitted in the will who were in being at its date, were intended to be included. Doubts, however, arose whether it included grandchildren, but the legislature, on the 18th of May, 1718, passed a resolve declaring the affirmative of the proposition, and such, ever after, was the received construction. Ancient Charters, c. 7, § 2, p. 351. The phraseology of the provision was somewhat changed in the act of the 6th of February, 1784, and the preamble was entirely left out. 1 Laws Mass. 1800, 111. By the eighth section of that act it is provided that any child or children, or their legal representatives, in case of their death, not having a legacy given him, her, or them in the will of their father or mother, shall have a proportion of the estate of their parents assigned unto him, her, or them, as though such parent had died intestate, provided such child, children, or grandchildren have not had an equal proportion of the deceased's estate bestowed on him, her, or them in the deceased's lifetime. The earliest decision of the courts of the State upon the subject is

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that of *Wild v. Brewer*, decided in 1797, and reported in the supplement of 2 Mass. 571. The testator in that case devised the income and improvement of his real estate to his wife, during her natural life, and then directed that, at her decease, the same should be divided among his grandchildren, describing them by their respective names; and as "children of my daughter Sarah," giving the estate to them "in equal parts or portions forever, for them to improve and dispose of as they may see fit," but he made no provision for his daughter, the mother of the devisees. She, with her husband, petitioned for partition of the estate, claiming a distributive share as heir at law, and the case was submitted to the court, upon an agreed statement of facts. Held, that she was not entitled to a portion of the estate as though the testator had died intestate. The next case is that of *Terry v. Foster*, 1 Mass. 146, decided in 1804, and is the first case upon the subject reported in the regular series of reports. The appellants in that case were the grandchildren of the testator; and the report of the case shows that their mother, the daughter of the testator, deceased before the date of the will. The material provision of the will was: "I give to my daughter Mary Russell, five dollars, and to my daughter Bushop, five dollars; to my grandchildren of my daughter Terry, deceased, to be paid to them when the youngest of them comes of age." Doubts were entertained by all the judges, whether any legacy was actually given to the appellants, but they all held that the act of the 6th of February, 1784, did not repeal the colonial statute, and that any child or grandchild being noticed or mentioned in a will showed that he was not forgotten; that the statutes taken together as *in pari materia*, extended only to cases of entire omission; that it was not necessary that the child or grandchild should have a legacy to exclude them, but that it was sufficient if it appeared by the will that the testator had not overlooked the claimant. Three years later the case of *Church v. Crocker*, 3 Mass. 17, was presented for decision. The report of the case shows that the testatrix in that case, gave one-fifth part of the residue of her estate to her six grandchildren, the children of her son Edward, but no legacy was given to Edward himself. The

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argument for the plaintiff was, that inasmuch as no legacy was given him in the will, he was undeniably entitled to a distributive share in the estate ; but the court held otherwise, after the fullest consideration. Public policy, say the court, requires that the right of testamentary disposition in parents respecting their children, should be exercised at their discretion ; and they held that the intention of the eighth section was, not to limit this discretion as distinctly conferred by the first section of the act, but to provide for a child or grandchild when this discretion from accident or some other cause had not been exercised. The conclusion was, that when a child is named in his parent's will, although he has no legacy given him, he is not entitled to a distributive share of the estate, because that fact shows that the child was in the mind of the testator at the time the will was prepared, and consequently that it cannot be held that he was omitted by accident or mistake. The last case under that statute is that of *Wilder v. Goss*, 14. Mass. 357, which has an important bearing upon the question under consideration. It is shown by the statement of the case that the daughter of the testator died before the testator, and before he made his will, leaving seven children who survived their grandfather. The wife of the appellant claimed a distributive share in the estate, as heir at law, because she had no legacy given her in the will, and was not named in the same. The name of the mother of the claimant was Rebecca Thurston. Among other things, the testator stated in the will that having before that time conveyed to his son-in-law, John Thurston, the principal part of his real estate, he should make no further devise to him, but gave a legacy to Thomas Thurston, brother of the claimant, and then the residue of his estate to his other three daughters, who were living. The facts show that the claimant was an heir at law to the estate of the testator when the will was made, and that she neither had any legacy given her nor was she named in the will. But the court held that the mention of her father by the testator as his son-in-law, and the giving of a legacy to her brother, must have brought the recollection of his deceased daughter to his mind, and showed that the family was in his remembrance, and consequently that she was not entitled to a

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proportion of the estate. Whenever it appears, say the court, that the testator has, through forgetfulness or mistake, omitted to bestow anything upon his child or grandchild, the legislature wisely intended to effect that which it was highly reasonable to believe the testator, but for such forgetfulness or mistake, would himself have done. But the court insist that to go further than that, would be to defeat the principal intention of the legislature in the first section of the act, which authorizes every person seized of an estate in lands which may extend beyond his own life, to devise the same as he shall see fit. Consequently, whenever it may fairly be presumed from the tenor of the will, or of any clause in it, that the testator intentionally omits to give a legacy or to make a devise to his child or grandchild, whose parent is dead, the court will not interfere. Such were the views of the Supreme Court of the State, in the several cases which arose under the statute of the 6th of February, 1784; but the court went further in the case of *Wilson v. Fosket*, 6 Met. 400, which is a case that arose under the Revised Statutes of 1836, and held that it was not necessary that it should appear by the will itself that such omission was intentional, but that it may be shown by parol proof; and such, it is believed, is the settled doctrine of the State court.

Referring to the prior decisions, the court say the construction has been, that whenever, from the tenor of the will or from any part of it, sufficient appeared to indicate that the testator had not forgotten his children or grandchildren (as the case might be) when he made his will, they would not be entitled to a distributive share of his estate, although no legacy was given them by the will. The emphatic language of the court is, that whatever may have been the grounds of the decision, it came to be well settled that the object of the prior statute was to furnish a remedy solely for those cases where, from accident or other causes, the child or grandchild might be supposed to have been really forgotten by the testator in making his will.

Reference is then made to the decided cases which affirm that doctrine, and it is undoubtedly true that they sustain the proposition. The construction given to the provision in the prior act

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was adopted in the Revised Statutes, which "introduced the broad principle of barring a child of a claim to a distributive share, upon its being made to appear that such omission to give a legacy was intentional and not occasioned by any mistake or accident." *Wilson v. Fosket*, 6 Met. 404, decided in 1844. After-born children, it will be remembered, were included in the provision contained in the colonial statute, and the twenty-second section of the Revised Statutes expressly provided that when any child of a testator, born after the father's death, shall have no provision made for him by his father in his will or otherwise, he shall take the same share of his father's estate, both real and personal, that he would have been entitled to if his father had died intestate. Rev. Stat. (1836) 419. Explicit as this provision is, it still left the question as to what the rule should be in a case where a child was born after the making of the will and before the death of the father, quite undetermined. No such question was presented to the State court until 1855, when it came up in the case of the will of Thomas P. Bancroft. *Bancroft v. Ives*, 3 Gray, 367. The agreed statement in the case shows that the testator, having married the plaintiff in that case, had three children by her, and made his will, giving a legacy to each of the children and the residue to his wife. Said children all died in the lifetime of the testator, unmarried and without issue. But two other children were afterwards born to him, who were in full life at the date of the controversy. Plaintiff claimed the whole estate, but the court held that the provision under which any child for whom its father "shall omit to provide in his will is entitled to a share in his estate, unless such omission was intentional," applies also to children born after the making of the will and before the death of the father. Speaking of that provision as contained in the Revised Statutes, the court say: "We think it manifest that it was not the intention of the commissioners and legislature to alter the law in this respect, but only to give effect to the old statute, and to affirm and give the authority of positive law to the construction which had been put upon it in several cases." Some of the remarks of the chief justice who gave the opinion, are supposed to be inconsistent with

that view of the law, but the opinion itself affords conclusive refutation of that suggestion. Proof of that statement is found in the quotation already given from the opinion, and if more be needed, it will be found in the fact that the court cites with approbation every one of the prior cases which contributed to establish that construction. Omission to provide for children born after the will and before the death of the father, may well be regarded as occasioned by accident or mistake, in a case where the will, made before their birth, gave legacies to all the living children. Hence the court say in that case, "taking his will and the legacies therein given to the children then living, it appears that it was not his intent to omit any of his children, but to give each a legacy," as therein provided.

The true rule therefore is, that a child or the issue of a deceased child, when the testator omits to provide for him in his will, is entitled to a distributive share in the estate, unless it appears that such omission was intentional, and not occasioned by accident or mistake. "Whenever, from the tenor of the will, or from any part of it, or from parol proofs, or both combined, sufficient appears to show that the testator had not forgotten his children or grandchildren, as the case may be, when he made his will, no such child or grandchild is entitled to a distributive share in his estate, although no legacy was given him by the will." Direct decision is made to that effect in *Wilson v. Fosket*, 6 Met. 403; and there is nothing in the remarks of the chief justice in *Bancroft v. Ives*, 3 Gray, 370, to overrule or qualify that doctrine. Undoubtedly a testator may revoke, republish, alter, or modify his will by any codicil or number of codicils quite up to the time of his death; and in that sense, it may be said that a man's will is ambulatory; but it by no means follows, if a man makes a will and dies without revoking, republishing, altering, or modifying it, that it must not be construed as of the date when it was made; and if it appears that a child or grandchild having no legacy was intentionally omitted, and not by accident or mistake, such child or grandchild is not entitled to a distributive share. It must be so, else it is not true, as is provided in the first section of the statute of wills, that every person of full age

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and of sound mind, may devise and dispose of his estate therein described, by his last will and testament in writing. Nothing need be said in explanation of the remark that all the testamentary papers, in force and capable of taking effect at the decease of the testator, constitute his will, as it is a remark which all must approve, and in that view, unquestionably the time to which the question of omission applies, is the time of the testator's decease; but it cannot be that the court in that case intended to hold that evidence of prior acts and declarations of the testator were not admissible, as tending to show whether the supposed omission was or was not, intentional at the time the will was made. Assuming such to be the effect of that remark, then it is directly contrary to the ruling in *Wilson v. Fosket*, 6 Met. 403, and is expressly overruled by the case of *Converse v. Wales*, 4 Allen, 512, which is the latest case upon the subject. It was alleged in that case, that the omission was intentional, and that it was not occasioned by accident or mistake; and to prove those facts, the respondents were allowed to introduce evidence of the declarations of the testator, made before and after the will, during a period of twenty years, and they were also allowed to introduce several former wills, in which no provision was made for the petitioners. The instructions of the court to the jury were also to the same effect; and the petitioners excepted to the ruling of the court in admitting the evidence, and also to the instructions of the court.

The opinion was given by Chief Justice Bigelow. He held that in the absence of written evidence there was no mode of proving the intent of the deceased testator, in such a case, more direct and satisfactory than by his acts and declarations on the subject while living, and that the previous wills made by the testator are in the nature of declarations having a direct bearing on the issue. They tend, say the court, directly to show if the same omission exists in them as is found in the will offered for probate, that it was not occasioned by forgetfulness, mistake, or any accidental circumstances, but was the result of a well-settled and deliberately formed purpose. Doubt cannot be entertained, if prior wills are admissible to prove that the omission was inten-

tional, that subsequent codicils are also admissible for the same purpose. Applying those principles to the present case, it is quite obvious that the question under consideration is one of fact, to be determined from the tenor of the will, the attending circumstances, and the parol proofs exhibited in the case. Take the facts as they appear on the face of the will and the codicil, and they are sufficient to show that the complainants were intentionally omitted, and not by mistake or accident. One third of the net income of the remainder of the estate was given in the will to the father of the complainants during his natural life, and he and the complainants were living at the date of the will. By the terms of the will the legacy to the father was limited to his life, but the devise over for the benefit of the poor is plainly and clearly expressed. All the parties were then living; and there is not a doubt entertained by the court, as matter of fact, that it was the settled purpose of the testatrix to omit the complainants, and to dispose of the inheritance as specified in the will. Reasonably considered, nothing else can be inferred from the carefully arranged terms in which the legacy to the father and the devise over are expressed. Strong confirmation of this view is found in the terms of the codicil. The codicil was executed on the 14th of July, 1859, after the death of Cornelia W. Thompson, as before explained, and its language is: "I revoke so much of my said will as provides for the said division of the said income, and its payment in three parts." Mention is made of the death of her daughter Cornelia, and she orders and directs that the income of the estate shall be paid, under the conditions and provisions contained in the will, to her two surviving children by their respective names, during their joint lives, and one half thereof to the survivor of them, showing, in the language of Chief Justice Bigelow, that it was the result of a well-settled and deliberately formed purpose. Irrespective, therefore, of the parol testimony, I am of the opinion that it appears, from the tenor of the will when taken with the codicil, that the omission of the complainants, if such it may be called, was intentional, and was not occasioned by accident or mistake, within the meaning of the provision under consideration, in the Massachusetts

statute of wills, as expounded by her courts. Ample provision was made for the father of the complainants, and it makes no difference that the legacy to him was limited to his life, because the fact of that limitation in the will, and its careful repetition in the codicil, especially when taken in connection with the devise over for the benefit of the poor, show conclusively that the entire disposition of the estate was in accordance with the settled purpose of the testatrix. But if there could be any doubt upon this subject, the parol testimony introduced by the principal respondent is conclusive that there is no legal merit in the claim of the complainants. Suffice it to say, without reproducing the evidence, that it is fully proved that the testatrix repeatedly said that her son should have his share of the income during his life, but that his children should not have any portion of her estate after his decease; and the witnesses say that her declaration was that the son should have the use of one third of the property during his life, and that after his decease it should go for charitable purposes. Such proofs coincide with the tenor of the will, and with all the presumptions to be drawn from the surrounding circumstances, and when considered in connection with those circumstances and the unmistakable inferences to be drawn from the tenor of the will, they afford a demonstration that the claim of the complainants has no legal foundation. Strong doubts are entertained whether grandchildren living at the date of the will of the grandfather, can ever be regarded as omitted because not named as legatees in his will, in any sense within the meaning of the statute, where it appears that their father was living at the same time, and was provided for in the will. Plainly they cannot be so regarded if the father is the donee of an inheritable estate, because it is expressly enacted, that where such a legacy is given to the father and he dies before the testator, his children shall take the legacy given to him in the will. Gen. Stat. c. 92, § 28, p. 479. The same conclusion must follow where the legacy to the father is of an estate for life, if the remainder is also devised, unless it be assumed that a devise by a father to his children for life and a remainder over to third persons is void, in case one of the children dies before the father, leaving issue. Grant that

proposition, and then it is not true, as enacted in the first section of the statute, that every person may devise and dispose of his estate by will in writing. Carefully examined, the claim of the complainants is not founded upon any accident or mistake in the testatrix, but it is indubitably an attempt to restrict and qualify the right of parents to dispose of their estate by testamentary devise. Children are omitted when no legacy is given them, and they are in no manner named in the will, as exemplified in the decisions of the State court. Grandchildren stand upon the same footing where it appears that their parent died before the execution of the will, because, in that state of the case, they are the issue of a deceased child, and fall directly within the provision upon that subject. Posthumous children fall within the same category, because they are within the express words of the colonial statute; and under the decisions of the courts, it is also settled that children born after the date of the will and before the death of the testator shall have the same rights. In all these cases the foundation of the right, as expounded by the courts is, that the omission was unintentional and through accident or mistake, as appears by all the decisions of the State courts. But in the case at bar, there is no such foundation or just pretence for it, and therefore the rule cannot apply. The testatrix, when she made her will, gave legacies to all her children, and when one deceased without issue she made a codicil, and did the same thing for all who were living, including the father of the complainants. As before stated, they were born before the will was made, and neither child nor grandchild was born after the will was executed. All of the circumstances were in the mind of the testatrix both when she made the will, and when she afterwards deliberately modified it, and nothing occurred subsequently, to give the least countenance to the theory that there was any such mistake or accident as the law contemplates, to warrant the interference of the court.

The complainants scarcely deny that the power conferred upon the trustees in the will, to select and appoint the committee, could be executed by the surviving trustee, provided it be held that the power is one coupled with an interest, but they contend that it is

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a mere naked power to two persons which cannot be executed by one. The substance of that provision of the will is, that "when upon the decease of all my children, the trust fund is to be disposed of as aforesaid," that is, for the benefit of the poor, "the said Marsh and Guild, or their successors as trustees, shall select and appoint three or more gentlemen, who shall be informed of the facts by the trustees, and shall determine how, by the payments to permanently established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect," &c. Three persons were accordingly selected and appointed by the surviving trustee, and they have determined that the several corporations made parties respondents, shall be the recipients and beneficiaries of the testatrix's bounty. The record shows that the power has been executed, but it is insisted by the complainants that the proceedings are a nullity. The courts of the United States cannot exercise any equity powers, except such as are conferred by an act of Congress, and those judicial powers which the high Court of Chancery in England under its judicial capacity, as a court of equity, possessed and exercised at the time of the formation of the Constitution of the United States. Powers not judicial, exercised by the chancellor as the representative of the sovereign and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the Circuit Courts. *Fontain v. Ravenel*, 17 How. 390. The Supreme Court hold that the prerogative power belonging to the sovereign, has not been delegated to the Federal government, but remains in the several States, and is to be exercised according to the laws and usages prevailing in the several States. Consequently, whenever, by reason of citizenship or otherwise, a cause is brought before the Federal tribunals involving the validity of a bequest or devise to charitable uses, the question to be considered always is, whether it would be held valid or not in the courts of the State. Numerous decisions of the Supreme Court assert this doctrine, and it has been the uniform course of the court. *Trs. Philadelphia B. Ass. v. Hart's Exrs.*, 4 Wheat. 1; *Beatty v. Kurtz*, 2 Pet. 566; *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99; *Wheeler v. Smith*, 9 How. 55. The state decisions cited for the principal respondent

show beyond controversy, that the equitable jurisdiction of the Supreme Court of the State is established over charities in its broadest application; that the statute of Elizabeth is part of the common law of the State, and that it is the settled course of judicial decisions that a devise of property to charitable uses will be upheld. Argument in support of those propositions is unnecessary, as the authorities to support them are numerous, direct, and conclusive. Authority to select and appoint the committee was not a personal trust, because it is expressly provided in the will that it shall be exercised by the persons named, or their successors as trustees. The directions of the testatrix in that behalf were not to be carried out until the decease of all her children, and as they or some one of them might live for many years, it was provided, that if the persons named as trustees deceased before the time designated for the selection and appointment arrived, the duty might be performed by their successors.

The terms of the will show that the entire estate was vested in the trustees, and their successors as trustees, and they were authorized to sell and convey any and all real estate which might at any time be in their hands, according to their joint and sole discretion. Looking at the terms of the will, no doubt is entertained that the power in question is one coupled with an interest. Such a power survives, and may be exercised by a surviving trustee, or by successors. *Butler v. Bray*, 2 Dyer, 189; *Attorney-General v. Gleg*, 1 Atk. 356; Lewin on Trusts, 299. Suppose, however, that any doubt could arise upon the subject under the general equity law, still, the decisions of the State courts fully support the proposition, and they must be regarded as conclusive. *Greene v. Borland*, 4 Met. 330; *Dixon v. Homer*, 12 Cush. 43; *Dexter v. Gardner*, 7 Allen, 243.

Sufficient has already been remarked to show that the third proposition of the complainants cannot be sustained, because it is made to appear that the intention of the testatrix to give the property for the benefit of the poor, has been legally carried into effect. Other propositions were submitted by the complainants, but they are so fully answered by the State decisions, that it seems

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quite unnecessary to enter into argument upon the subject. Unless the State decisions are to be overruled, it is plain that the second and third propositions of the complainants cannot be sustained. In view of the whole case, I am of the opinion that the complainants are not entitled to relief.

Bill of complaint dismissed with costs.

HENRY A. AYLING v. LIVERUS HULL.

The presumption arising from the introduction in evidence of his patents, that the complainant is the original and first inventor of the invention therein described, may be regarded as strengthened by the fact that the complainant's application and respondent's patent were declared in interference at the Patent Office, that the cases were appealed to the Superior Court of the District of Columbia, being at every step decided in the complainant's favor, the respondent, during the entire pendency of the interferences, asserting himself to be the original and first inventor.

It was held that the subjects-matter of the complainant's patents were not the same as that of the English patent of Alexander Parker.

It is competent for the Circuit Court to entertain a bill of complaint, founded on letters-patent of the United States, for an injunction, for an account, or for the repeal of an interfering patent for the same invention.

The motion for injunction is addressed to the discretion, and the court may or may not, according to the circumstances, order issues for a jury.

An inventor, at the time of making his discovery, intended to apply for letters-patent thereon; but having been incorrectly advised that his invention was anticipated by a patent of prior date, he kept his improvement a secret, practising it for his own benefit; and when aware that he had been misinformed, he filed his application without unnecessary delay. *Held*, that he had not so postponed his application for a patent, and concealed his invention, as to forfeit his right to the grant of a patent.

THIS was a bill in equity in which the complainant alleged that he was the first and original inventor of an improved process for changing, curing, or treating caoutchouc, and also of an improved product from caoutchouc, which product was the result of the said process. The two inventions were embraced in separate patents, each bearing the same date, to wit, May 10, 1864.

The prayer of the bill of complaint was, that two certain letters-patent granted to the respondent might be adjudged and decreed to be void throughout the United States, and for an injunction and for an account.

The invention described in the first patent of the complainant was a new process by which caoutchouc and its compounds were changed or cured, so that they were unaffected by changes of temperature, by contact with fatty and acid substances, and by exposure to the atmosphere, and so that their strength and elasticity were increased. The change produced on caoutchouc was similar to that effected by heat in the presence of sulphur, known as vulcanization, except that there was no sulphur left in the rubber, nor were there any other agents left therein tending to its injury or destruction ; and except also, that the change was more permanent and uniform in its character.

The patentee stated that the process was essentially "a cold one," which could be successfully practised in any degree of natural temperature, and might be described as consisting in bringing the caoutchouc into contact for a suitable time, with a recently discovered fluid solvent thereof, known in commerce as "carbon spirits," when the fluid was combined with chloride of sulphur in the proportion of about one measure of the chloride of sulphur to fifty of the carbon spirits.

In the other patent, the specification described the product or article of manufacture as chiefly composed of caoutchouc, and combined with carbon spirits and chloride of sulphur. It was charged upon the respondent that he obtained and held two certain patents, which covered the same inventions as those secured to the complainant in the patents, upon which the suit was founded. Of the patents of the respondent, one was dated December 26, 1864, and entitled "an improvement in treating caoutchouc," the other, March 10, 1863, and was upon an improved caoutchouc or india-rubber.

It was alleged in the bill of complaint that the patents of the respondent were an interference with the patents of the complainant, and that the respondent refused to acknowledge the rights of complainant, and was using and practising the inventions in violation of complainant's rights. It was admitted that the patents of the two parties were upon the same inventions.

Several defences were set up in the answer, of which the following are all that require recapitulation : —

First, that neither party was the original and first inventor of the improvements, but that both were old and belonged to the public. To prove this, an English patent granted to one Alexander Parker was introduced in evidence.

Second, inasmuch as the complainant's patents were issued only a short time before the filing of the bill of complaint, the court ought not to order an injunction, or enter any decree affirming the validity of the patents, until the same had been judicially established; and to that end the respondent asked that proper issues might be framed, and the cause sent to a jury.

Third, that the defendant not only did not use reasonable diligence in completing the alleged discovery, but that he secreted and concealed whatever he had accomplished, for his own benefit, and for such length of time that he had no superior equity over the respondent, and therefore that the court should leave the parties to their legal rights.

The more important portions of the evidence applicable to the first defence may be gathered from the opinion of the court when considering the question of originality, and the facts upon which the third defence was based appear in the discussion, by the court, of that point.

B. R. Curtis and *Chauncey Smith*, for complainant.

F. A. Brooks, for respondent.

CLIFFORD, J. The patents of the complainant being introduced in evidence, the *prima facie* presumption is, that he is the original and first inventor of what is therein described as his invention, and the conduct of the respondent may be regarded as strengthening that presumption rather than as weakening it. The record shows that he applied for patents for the same improvements, and that an interference was declared by the Patent Office in each case, between his applications and those made by the complainant. The first hearing was before the examiner, and he decided against the respondent. Appeals were taken in due course of business, to the board of appeal and to the commissioner, both being decided in the same way, and he thereupon appealed to the ultimate tribunal, but met with no better success. Throughout these controversies, he steadily and constantly maintained

the validity of his applications, and still continued to press his claims for patents until the same were granted. The record also shows that having succeeded in obtaining his patents, he brought a suit against the complainant, charging him with infringement of his patents, and claimed that he, the respondent, was the original and first inventor of the improvements therein described and secured. Being unable to show any right to enjoy the property of the invention himself, he now denies the originality of invention either in himself, or the complainant, and seeks to destroy it as a right of property in the complainant. Ungracious, however, as the defence is, still, it is a sufficient one if it be proved. But it is not proved, and the pretence has no foundation whatever. On the contrary, the testimony introduced by the complainant shows, to the entire satisfaction of the court, that the complainant is, as he alleges himself to be, the original and first inventor of the improvement. The patentee of the English patent took, as he states in his specification, forty parts of bisulphuret of carbon and added to it one part of chloride of sulphur prepared as neutral as possible, mixed well the ingredients in a suitable vessel, and immersed caoutchouc in sheets or other forms in the mixture, allowing them to remain therein a longer or shorter time, according to the thickness or substance of the article. The fluid used by the complainant, is the product of the distillation of the natural petroleum or rock oil, and is combined with chloride of sulphur in the proportions before mentioned.

The expert testimony offered by the complainant, shows that coal-tar naphtha has been long known as the light oil produced in the decomposition of coal, when sudden and high heat is applied to it. The statement is that it consists, when highly rectified, in a large part, of a substance called by chemists benzole or benzine, and that it has specific characters, although it is a mixture. The principal expert witness called for complainant states that it has a low boiling point, but congeals wholly or in part at about the temperature of freezing water. It forms compounds of decomposition with nitric-acid, one of which crystallizes and has the composition of compounds in the benzole series, derived from

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benzoic acid. One of its peculiar physical characters is, that although very volatile, it does not diffuse in air at forty degrees, and cannot, therefore, be used in the manufacture of air-gas. The witness states that he has been acquainted with the article, under different names, such as coal-tar naphtha, light-spirits naphtha, crude benzole, and rectified naphtha, for more than twenty years. Chemists, he says, have known it more than forty years, under these and other names, and that he has experimented with it at different times within the period since it came to his knowledge. On the other hand, he states that petroleum naphtha or carbon spirits is a fluid distinct from the other hydrocarbons, both in physical and chemical characters, and that it constitutes a new product, which cannot be included in any other known series. He describes it as a light mobile fluid, obtained in the purification of crude petroleum oil, and by the slow distillation of bituminous coal at the lowest possible heat. His representations are, that it has peculiar physical and chemical characters, as, for example, it has a high boiling point much above that of water, and yet it diffuses in air at a temperature of forty degrees rapidly, and, consequently, becomes an efficient agent in the production of what is termed air-gas. Another characteristic is, that it exhales rapidly and completely at a temperature of sixty degrees without a particle of residuum or without becoming colored, and it may be mixed with other bodies without producing change of color. When exposed to cold, it bears the reduction of fifty degrees below zero without becoming solid, and still remains a mobile fluid, and when mixed with nitric-acid, its chemical property is such that it does not form nitro-benzole by decomposition, nor can the products of the benzoic series be then obtained from it. The conclusion of the witness is, that its elements are differently united from those of coal naphtha, or any of those resulting from the application of a high temperature to coal; and there can be no doubt, in the judgment of the court, that his conclusion is correct. The evidence also shows, that the product obtained by the complainant is new, and that the respondent is plainly in error in the views he puts forth upon that subject. Jurisdiction in suits of this nature

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is conferred upon the Circuit Courts by an act of Congress, and it is competent for the court to entertain a bill of complaint for an injunction and an account, or for the repeal of an interfering patent for the same invention, at any time after the letters-patent are granted. Undoubtedly the application for injunction is in all cases addressed to the discretion of the court, and it may be that the court, under some circumstances, might order issues to a jury in a suit like the present, for the repeal of an interfering patent. Suffice it to say, however, there are no circumstances in this case which afford any proper ground for the last-named application, and the respondent has no claims for any delay, if the complainant is entitled to a decree.

The theory of fact on which the third defence is founded is not correct. The complainant did exercise reasonable diligence in adapting and perfecting his invention, as appears from all the evidence, when properly understood. When he made his invention he intended to apply for a patent, and doubtless would have done so, had he not been misled and been induced to believe that his invention had been anticipated. While laboring under that impression, he decided to keep it secret and practise it for his own benefit; but the evidence clearly shows that as soon as he was undeceived, and it came to his knowledge that he had not been anticipated, he began his preparations for application for a patent, and obtained it without unnecessary delay.

None of the defences set up by the respondent can be sustained, and they are accordingly overruled.

The complainant is entitled to a decree as prayed in the bill of complaint, and for his costs.

GEORGE C. ROBERTS v. SYLVESTER HARNDEN.

The first claim in a patent on an improved refrigerator was as follows: the employment of an open-bottomed ice-box, or equivalent thereof, in combination with a dividing partition, open above and below, so placed, that by means of self-operating internal circulation, the whole of the contained air shall be kept in motion and caused to revolve around this partition in currents, moving downward only on one side of the partition, and upwards only on the other, when the same is combined with a chamber for the refrigeration of food placed directly under the ice-box as set forth. This was immediately followed by a disclaimer of the vertical partition by itself, and the placing of articles to be refrigerated in a descending current of air. *Held*, it was a claim for the combination of three elements, viz., an open-bottomed ice-box, the partial partition, and the refrigerating chamber, operating as described in the specification.

Where all the elements of a machine are old, and the invention consists solely in the combination, by which a new and useful result is effected as compared with the old or previous machine, on which the improvement is made, no one can be held as an infringer who does not use all of the elements of the new combination. The invention consists in the new combination, and to that and its results the originator is entitled, but he cannot invoke the doctrine of equivalents to suppress any other invention which does not embrace his improvement.

The ice-box in the refrigerator of the complainant was described as an open-bottomed one, and was so made by making holes in the sides and bottom thereof; that of the respondent exhibited an eduction passage for the air across the bottom of the ice-box in the rear. The refrigerator of complainant was vertically divided by a partition, not however reaching the top and bottom of the inside, but allowing at each end a space for air circulation, produced by difference in temperature of the two divisions. One side of respondent's ice-receptacle served for the partition, which allowed a wider space at the bottom than complainant's, and it was claimed that the circulation was irregular and different from the complainant's. *Held*, that although the operation of the two might be different in the particular that the respondent's was the more imperfect of the two, the purpose and operation of the two devices in the two patents, was substantially the same.

In both inventions, the general tendency of the air in the compartment containing the ice-receptacle was downward, by reason of its comparative lower temperature and greater density; and in consequence of being warmer in the other division, upward.

If two machines produce substantially a similar result by substantially similar means, no proof of difference between them lies in the fact that one is less effectual in operation, or more imperfect in structure, than the other.

BILL in equity for the alleged infringement of a patent for an improvement in refrigerators, of which the complainant was the assignee. The original patent was granted to one D. W. C. Sanford of Cincinnati, November 13, 1855, and was reissued April 21, 1857. Shortly after the reissue, the patentee assigned an undivided half of the patent to one Charles G. Page, who

subsequently joined with him in an assignment of the whole interest or the principal part thereof to the complainant. It was charged in the bill that the respondent commenced to infringe the complainant's patent on the 21st of July, 1860, and had continued to do so up to the date of the suit.

The answer denied that D. W. C. Sanford was the original and first inventor of the improvement described in the specification of complainant's patent, or that the respondent had been guilty of any infringement thereon. It admitted the making and selling of refrigerators by respondent, in accordance with letters-patent granted to one John C. Schooley, from whom respondent alleged he held a valid license, but denied that these articles were constructed in the same manner as the patented device of the complainant.

The complainant's refrigerator was described as an entirety so far as the casing or outward form was concerned, but the interior was divided into two compartments by a partition which, however, did not quite reach the top or bottom of the inside, but left an opening or space between both the top and bottom of the partition and the top and bottom of the interior of the refrigerator, so as to admit of a free circulation from one to the other of the compartments. Placed at a high point in one of the divisions was an ice-box, perforated in the bottom and sides, to allow the free contact of the air with the ice therein, and having internal projections to prevent too close a contact of the ice with the sides of the receptacle. The bottom of the ice receptacle was funnel-shaped, in order to conduct the melted ice to a central discharge. A current of air was thus created in the refrigerator; the denser portions, in contact with the ice, descending and passing under the lower end of the partition, the more rarefied rising, coming in contact with the ice, and in their turn also descending. The air, it was alleged, would thus continue to circulate over and under the partition, and through the two compartments, until the ice had melted and an equilibrium of temperature had been established. It was further specified, that the moving air imbibed moisture from the fruits, vegetables, and other articles in the refrigerator, but coming in contact with the ice, by change of

temperature lost a proportion of its power of retaining the moisture which was condensed upon the ice, and finally passed off with the waste water, thus preserving the interior of the refrigerator from mould or dampness. Exhalations and the odor of meats, as the patentee represented, were also precipitated, with the condensed vapor, upon the ice ; and thus the compartments were kept sweet. It was admitted in the specification that a variety of devices for causing the internal circulation of air in the compartments of refrigerators were known, but it was asserted that no complete and continuous "rotation, purification, desiccation, and refrigeration of all the air contained in such compartments, had ever been effected under the same arrangement," as in the patentee's improvement.

The following were the claims : —

"The employment of an open-bottomed ice-box, or equivalent thereof, in combination with a dividing partition open above and below, so placed that by means of self-operating internal circulation, the whole of the contained air shall be kept in motion and caused to revolve around the partition in currents, moving downward only on one side of this partition, and upward only on the other, when the same is combined with a chamber for the refrigeration of food or provisions placed directly under the ice-box.

"Placing shelves or fixtures for holding articles to be refrigerated, or the articles themselves, in the descending current directly under an open-bottomed ice-box, in combination with a dividing partition open above and below.

"In combination with said shelves or fixtures so placed, constructing the open-bottomed ice-box in such manner that the air may pass freely down through the same, and fall directly from the ice, upon the articles to be refrigerated, while at the same time the drip of the water is prevented."

Vertically dividing one compartment of a refrigerator from another, and placing articles to be refrigerated in a descending current of air, were disclaimed. The disclaimer was placed immediately after the first claim in the specification. The patent, before named, upon which the respondent based his right to man-

ufacture and sell his refrigerators, employed the current of air, an ice-box, differing somewhat from the complainant's in construction, and a partition, in the interior of the structure, not reaching so low or near the bottom of the refrigerator as the complainant's, and combined with these a double movable register in two parts, one to admit external air to the ice, and the other to allow, at the same time, of the escape of the air which had remained for a time within the refrigerator.

The theory of this arrangement was, that without any admission of external air, an equilibrium of temperature was in time established within the refrigerator, and circulation ceased. The claim was for "the combination of the double register," with the ingress and egress openings with the partition having the openings at top and bottom, the whole arranged and operating substantially as described.

T. A. Jenckes and C. W. Huntington, for complainant.

B. R. Curtis and C. P. Judd, for respondent.

CLIFFORD, J. The better opinion is, that the first claim must be construed in connection with the several explanations which follow it, as those explanations are, to a certain extent, the construction which the patentee put upon the claim, and being a part of the instrument, and immediately connected with the claim, the whole must be construed together. Taken in that point of view, the invention consists in a combination of three elements, all of which are admitted to be old. The claim, therefore, is for the combination, and for nothing more. The elements of the combination are as follows: first, the employment of an open-bottomed ice-box, constructed in such manner that, by the perforation of holes in the sides and bottom of the box, the air will pass freely down through the same, and fall directly from the ice upon the articles to be refrigerated; the second element is the dividing partition, open above and below, and so placed that by means of a self-operating internal circulation, the whole of the contained air shall be kept in motion, moving downward and upward in currents as described, and be thereby caused to revolve around the partition; the third element is the chamber with the shelves or fixtures for holding the articles to be re-

frigerated, as more fully set forth in the explanatory clause. The currents are caused by the downward tendency of the cold air in the compartment or box containing the ice, and by the upward tendency of the warm air in the other compartment where it is less affected by the ice. As described, the partition does not extend to the bottom nor to the top of the casing, but leaves an opening, as it is called, at each end. The extent of the openings is not given, but it is quite evident that they must be sufficient to allow the currents of air, created by the downward and upward tendency of the cold and warm air, to revolve around the partition in the manner described. The utility of the invention when constructed as directed in the specification, cannot be doubted; and it is equally certain that the respondent has not introduced any satisfactory evidence tending to show that the patentee is not the original and first inventor of the improvement. The suit is founded upon the reissued patent, and when introduced the letters-patent are *prima facie* evidence that the patentee is the original and first inventor of what is therein described as his invention. An argument upon that topic is unnecessary, as there is no evidence to overcome the *prima facie* presumption which the letters-patent afford. Undoubtedly the second question, which is the question of infringement, is attended with more difficulty, as the evidence upon that subject is quite conflicting. The complainant does not deny that the rule of law applicable to the case is correctly stated by the respondent. Where all the elements of a machine are old, and the invention consists solely in the combination, by which a new and useful result is effected, as compared with the old machine, on which the improvement is made, no one can be held as an infringer who does not use all of the elements of the new combination. The reason of the rule is, that others as well as the first patentee, may improve the old machine; and if they do so by the use of a substantially different combination, they are not infringers, although they may have used all of the elements of the first invention, except one, and their machine may perform substantially the same functions.

The property of the first inventor consists in the new combi-

nation he has made, and to that and its result he is fairly and fully entitled, but he cannot invoke the doctrine of equivalents to suppress any other improvement which does not embrace his improvement, and which is substantially different. Formal differences or colorable evasions, however, are not sufficient to confer any right as against the first patent, but the patentee and all those claiming under him will treat all such as culpable infringements.

Applying those rules to this case, the respondent insists that he is not an infringer. He bases his defence in this behalf, chiefly upon two grounds, which will be briefly and separately considered. He insists, in the first place, that his ice-box is substantially different, because, as he insists, the eduction passage for the air across the bottom of the box in the rear, is not substantially the same as the holes in the ice-box of the complainant; secondly, because, as he insists, the side of the ice-box, as used in his machine, instead of the partition in that of the complainant, is not substantially the same as the partition in that of the complainant. The side of the ice-box, it will be observed, does not extend below the box itself, and consequently, the lower opening, if such it may be called, is much larger in the machine of the respondent than in that of the complainant. The corresponding suggestions are, that the machine of the respondent has no open-bottomed ice-box, like that of the complainant, and that it has no device or partition to keep separate the ascending currents from those which are descending. The theory of the complainant is, that the currents of air in his machine moved upward in one apartment, and downward in the other, but the respondent insists that the currents in his machine move in all directions in each apartment, and that in that respect the two machines are substantially different. Evidently the operation of the machine of the respondent is not as perfect as that of the complainant; but it cannot be admitted that an infringer can successfully defend himself against the charge of infringement by the allegation and proof that his machine is not as good as that of the inventor whose rights he has invaded. The rights of an inventor are oftentimes affected as injuriously by the sale of

poor machines in the market, as by those made more strictly in conformity to his patent. The effect of the eduction passage for the air in the one or the other machine is precisely the same in kind, and the mode of operation in the one and the other is also the same. The purpose is to allow the cold air to descend from the ice-box upon the articles to be refrigerated; and when that is accomplished, it passes into the other apartment, where the temperature is warmer, and ascends precisely as in the machine of the complainant. But it is said that inasmuch as the ice-box does not extend more than two thirds of the way to the bottom of the box, the operation is not as complete as it is in the machine of the complainant; and no doubt there is a difference, but it is one of degree, and not of kind, and in my judgment cannot save the respondent from the charge of being an infringer. The general tendency of the air in the compartment containing the ice-box is downward, and the general tendency of the air in the other compartment is upward; and although it may not be as completely so in either apartment of the respondent's machine as in the machine of the complainant, still the better opinion is, I think, that the difference is not such as will relieve the respondent from the charge of infringement. The same remarks are applicable also to the partition. The slide of the ice-box is not as long in the machine of the respondent, as the partition in the machine of the complainant; but the difference is merely formal, because, if it is not extended downward sufficiently to perform the same function as that of the partition, the machine would be of no value. Unless it accomplishes the same result in kind as the partition in the machine of the complainant, the machine would be useless; and it certainly is no defence that it is different in form, if it performs the same function in substantially the same way and produces substantially the same result. Nor is it any defence that the result is not as good, if it be substantially the same in kind and is produced substantially by the same means.

The complainant is entitled to a decree.

LEVI J. MABIE *et al.* v. ALANSON P. HASKELL *et al.*

The claim in a patent for an improved shoe-last was as follows: "The sectional shoe-last *a, b, c* formed in the manner specified, with the measurement 4 (which is the line drawn across the last from the corner of the toe to the back of the heel, at the upper part) as short as the measurement at the line 6 (which is the line drawn around the base of the last, from the corner of the toe to the centre of the heel at the junction with the sole), for the purposes as specified." *Held*, that the claim was not for a combination, where the invention consisted of a new arrangement of several old elements, but was for the peculiar form of the described device, in which the toe was elevated higher than usual, the back of the heel thrown forward, and which was as short in the first measurement described as in the second.

The purpose of the requirement of law, that an invention shall be described, in the patent, in such full, clear, and exact terms as to enable one skilled in the art to construct and use the same is twofold: first, that, when the patent has expired, the public may avail themselves of its benefits; second, that, while the patent is in force, the public may not ignorantly infringe it, for want of clear definition of its character.

It is not a defence to the charge of infringement upon a patent for an improved shoe-last, that it cannot be construed to embrace boot-lasts, when it appears in evidence that respondents had used the invention, without alteration, in the manufacture of boots as well as shoes.

It was set up in defence that the respondents did not infringe the rights of the complainants, because the last made by respondents was made in two, while that of complainants was made in three, sections. *Held*, that such a defence only had force where the patent of the complainant was for a combination, all the elements of which were old, and which { was only infringed when the entire arrangement or combination was wrongfully used.

THIS was a bill in equity founded upon letters-patent on a certain improvement in shoe-lasts. The inventor, one Nathaniel Jones, during the pendency of his application, assigned the entire interest to the complainants, to whom the patent issued September 16, 1862. The bill charged that the defendants had on the 1st of June, 1863, infringed the patent, and prayed for an injunction and for an account.

The defences were: first, that the assignor of the complainants was not the original and first inventor of the improvement set out in the patent; second, that the invention was not described in such full, clear, and exact terms as to enable a person skilled in the art to construct it; third, a denial of infringement on the part of the respondents.

The opinion of the court embraces all other facts necessary to an understanding of the case.

Mabic et al. v. Haskell et al.

T. S. Wakefield, for complainants.

J. W. Hubbard, for respondents.

CLIFFORD, J. The state of the art at the date of the invention is first described by the inventor. He states that it was usual, prior to his invention, to form the bottom of the last, so that a straight line would touch the bottom of the heel, and the sole of the foot part, raising the toe end of the last but little above a projection of that line, while the last at the back end of the heel was almost at right angles to such a line. The injurious effect of such a construction was, as the inventor states, that in walking, the person wearing such shoes found that the heel of the foot was apt to slip up and down in the shoe, and that the shoe itself, or the upper leather thereof, was apt to wrinkle over the front of the foot and at the side of the ankle. The reasons of the difficulty, as explained, are that a line measured around the lower edge of the last, from the corner of the toe to the centre at the back of the heel, was less, in a last so constructed, than a line measured from the same point of the toe to the back part of the last, near the top thereof, which made the shoe, as compared with the foot, measure most in the wrong place. Having stated the difficulties to be overcome, he proceeds to describe his invention, and says that it consists in so forming the last and cutting the "uppers," that the measurement from the point of the toe to the centre at the back shall be as small or smaller than the measurement at the lower part of the last, which improvement is effected, as the specification states, by raising the toe of the last, and drawing in the upper part of the last at the back above the heel. The beneficial effect of a last so formed is, that the shoe takes a bearing on the upper part and sides of the foot, sufficient to prevent the motion of the heel in the shoe, and the sole being made nearly in the form it will assume after the shoe is worn, there will be no wrinkles in the upper leather of the shoe. The next step of the inventor is to describe what he calls his improved last, and "the principle on which it is shaped." Reference is then made to the drawings; and the statement of the inventor is, that the device there delineated will show more fully the peculiarity of shape given to the shoe, demonstrating

that the alleged peculiarity of shape or form is the characteristic feature of the invention. Figures two and four of the drawings represent the last in three sections. Part *a* is the main section of the last; part *b* is the usual front or instep piece; and part *c* is a heel section formed by sawing off the back part of the last diagonally from near the junction of the sole with the back of the last. The statement of the specification is, that these sections are held together by dowels and a screw. The peculiar shape of the last is again pointed out by reference to the red lines in the drawings; and the allegation is, that the toe of the last, constituting the patented invention, is elevated higher from the base line, as there indicated, than is usual, and that the back of the heel at the upper part is thrown forward. The extent of these changes is such that a line drawn across the last from the corner of the toe to the back of the heel, at the upper part, will be as short or slightly shorter than a line drawn around the base of the last from the corner of the toe to the centre of the heel, at the junction of the sole. Whereas the reverse of that, as the inventor states, is true in lasts made prior to his invention. The representation also is, that the patterns for "uppers" are cut with reference to the peculiar shape of the last, and that many advantages result from the use of this invention. One is, that the shoe can be made for a higher instep than with the old lasts, without interfering with the mode of obtaining a correct draught of the heel and sides of the shoe. When completed, also, the shoe assumes a shape adapted to the form and position of the foot; so much so, that if a fit be made moderately tight, the shoe will remain on the foot without any lacing, and the heel will not move up and down in walking, because the leather will set closely to the sides of the foot. Such is the description of the invention as set forth in the specification and as illustrated in the drawings. The claim of the patent is as follows: "What I claim and desire to secure by letters-patent is the sectional shoe-last (*a, b, c*) formed in the manner specified with the measurement 4 (which is the line drawn across the last from the corner of the toe to the back of the heel at the upper part) as short as the measurement at the line 6 (which is the line drawn around the base of the last from

the corner of the toe to the centre of the heel at the juncture with the sole), for the purposes and as specified." Evidently the claim is not for a combination, as where the invention embraces several old elements, and the improvement consists in some new arrangement of those elements, whereby a new and useful result is obtained. On the contrary, it is quite clear that what the inventor claims is the forming the last as described, that is, that the toe of the last shall be elevated higher than what was usual prior to the date of the invention, and that the back of the heel shall be thrown forward, as shown in the drawings, and that the last, "formed in the manner specified," shall be as short or slightly shorter in the first measurement described in the claim than in the second measurement. Carefully examined, it is clear that it is a patent for the peculiar form of the described device, and not for a combination, as understood in the decided cases.

The respondents deny that the assignor of the complainants is the original and first inventor of the improvement, and upon that question the parties have examined more than forty witnesses. The parties must be content, under the circumstances, with the statement of the conclusion of the court upon matters of fact, as the separate examination of the testimony of the witnesses would extend the opinion to an unwarrantable length. Suffice it to say, after an attentive perusal of the testimony, I am of the opinion that the invention in controversy is both new and useful. Elevating the toe will not accomplish the result, unless that change be combined with the described alteration at the heel; and it is a great mistake to suppose that the alteration at the heel of the last consists merely in making the particular measurement shorter by cutting off the heel part of the last at the top. The patented improvement contemplates nothing of the kind, but the heel part is thrown forward, which has the double effect to produce the proper swell on the sides of the last, and also to shorten the line from the corner of the toe to the back of the heel at the top. Attention to the true construction of the patent and to these explanations will show that the most of the testimony introduced by the respondents is either erroneous or has no application to the real nature of the invention.

The second defence set up by the respondents is, that the invention is not properly described in the specification, but I am of the opinion that the objection is entirely without merit. Instead of being indefinite and insufficient, as is supposed, the description is in fact unusually full and precise. The requirement is, that it shall be in such full, clear, and exact terms as to enable any one skilled in the art to make, construct, and use the invention. The purpose of the requirement is twofold: first, that when the term has expired and the invention becomes public, such means of information may be accessible as will enable others to avail themselves of its benefits; and, second, that, while the patent is in force, others may be informed of the precise claim, and not ignorantly infringe upon the exclusive right. The meaning of the requirement is, that the specification shall be so clear that it may be understood by ordinary mechanics, and that the thing described can be made from the description and the drawings. *Hogg v. Emerson*, 11 How. 606. The description in this case is full and satisfactory, and the objection is overruled.

The third defence is a denial of the charge of infringement; but the denial is special, and on that account deserves to be carefully considered. The improvement as claimed is for shoe-lasts, and the argument is, that it cannot be considered as including boot-lasts. But the evidence shows that the respondents have used it for the making of shoes as well as boots, and that the improvement is suited for the making of the latter as well as the former, so that the objection in any point of view cannot prevail. The remaining ground assumed by the respondents, in this branch of the case, is, that they do not infringe, because, as they insist, the last they make, use, and vend is a last of two sections, and not of three, as described in the specification of the complainants' patent. They insist and well insist, that where an invention consists merely in a combination of elements, all of which are old, a party is not guilty of infringement who uses only a part of those elements. The leading case upon that subject is that of *Prouty et al. v. Ruggles et al.*, 16 Pet. 340, in which the opinion was given by the late chief justice. The instructions given to the jury in that case were, that, unless it was proved that the

United States v. Benzon et al.

whole combination was substantially used in the defendants' machine, the act complained of was not a violation of the plaintiffs' patent, although one or more of the parts specified were used in the combination of the defendants. Exceptions were taken to that part as well as to other parts of the charge, but the exceptions were overruled, upon the ground that none of the parts were new, and that the patent was for a combination, and that the invention consisted merely in arranging different parts of the machine in the manner stated in the specification, for the purpose of producing a certain effect. The correctness of that decision cannot be denied, but the answer to it as applied to this case is, that the improvement in question is not a combination, as has already appeared. *Hall v. Wilds*, 2 Blatch. 200.

In view of the whole evidence, I am of the opinion that the respondents are guilty of infringement, as is alleged in the bill of the complainants.

The complainants are entitled to a decree.

THE UNITED STATES *v.* EDMUND L. S. BENZON *et al.*

The plaintiffs, prior to July 14, 1862, made certain importations into the United States, and warehoused the same. Upon these importations the duties were ascertained, according to the existing act of August 5, 1861; and when said importations were made, the act of August 5, 1861, was in force. The importations were withdrawn from the warehouse, for consumption, after the first day of August, 1862, and after the act of Congress of July 14, 1862, took effect, each withdrawal having been made more than three months from the date of importation, but less than three months from the date of the deposit in the warehouse. *Held*, that the importations were subject to the duties prescribed by the act of July 14, 1862.

By the act of March 2, 1862, the importer could withdraw his merchandise from warehouse within three months from the time of depositing them there; but by the act of July 14th this period was changed to three months from the date of original importation. *Held*, that the act of July 14th, in its application to a case of this nature, was operative and constitutional.

The provisions of the act of March 2d, relating to the time in which the importations might be withdrawn from warehouse, is not to be considered a contract between the importer and the government, but a regulation of a privilege granted by the government, which privilege the government may entirely withhold.

Similar changes have frequently been made upon this subject by Congress.

The importation of goods, as between the importer and the government, is not complete as

long as the goods remain in the custody of the officers of the customs; and until they are delivered to the importer, whether on shipboard or in warehouse, they are subject to any duties on imports which Congress may see fit to impose, and to new legislation as well in relation to duties as to alteration in warehouse laws.

THIS was an action of assumpsit brought to recover the sum of \$4,992.42 and interest, alleged to be due the United States from the defendants, as and for duties on certain goods imported by them into the port of Boston. The following is the substance of the agreed statement upon which the case was submitted:—

In the year 1862, in the months of April, May, and June, the defendants made eleven different importations of iron and steel into the port of Boston; each importation was duly entered on its arrival, and the duties being ascertained according to the existing rates of duty on such goods. Each importation was properly warehoused, and the defendants in each instance executed a bond in the form then required by law.

At the time of the arrival of each importation, duties were assessed on it in accordance with the tariff acts then in force. And only the duties thus assessed were paid by the defendants on the withdrawal of the several importations from warehouse.

The importations were all withdrawn from warehouse after the first day of August, 1862, and after the Tariff Act of July 14, 1862, went into effect; and in the case of each importation, the withdrawal was more than three months from the date of the importation, but less than three months from the deposit in warehouse.

The government claimed that the goods were liable to duty under the provisions of the act of July 14, 1862.

The whole amount of these duties was the sum of \$4,992.42; for the recovery of which, with the interest thereon, this suit was brought. The government claimed that interest should be allowed on each of the items which make up this amount of \$4,992.42, from the day when the goods were withdrawn from warehouse.

If the plaintiffs were entitled to recover any or all of the sums claimed, judgment was to be entered for the amount due them,

according to the opinion of the court, and for costs. If the plaintiffs were not entitled to recover, then judgment to be for the defendants.

R. H. Dana, Jr., District Attorney, and *T. K. Lothrop*, Assistant District Attorney, for the United States.

The language of the fifth section of the act of August 5, 1861, is as follows: —

“ All goods, wares, and merchandise, actually on shipboard and bound to the United States, and all goods, wares, and merchandise, on deposit in warehouses or public stores at the date of the passage of this act, shall be subject to pay such duties as provided by law before and at the time of the passage of this act: provided, that all goods deposited in public store or bonded warehouse after this act takes effect and goes into operation, if designed for consumption in the United States, must be withdrawn therefrom, or the duties thereon paid in three months after the same are deposited.”

This statute was in force when the several importations of goods made by the defendants, and for a part of the duties on which this suit is brought, were made. The goods, on their arrival, were deposited in warehouse under its provisions, and the form of the bonds given, was in accordance with its requirements.

At this time, the duty to which these goods were subject was fixed by this statute, and on the arrival and entry of the respective importations, the amount of this duty was ascertained, in accordance with its provisions.

While the goods were still in warehouse, Congress passed the act of July 14, 1862, the twenty-first section of which provides: —

“ That all goods, wares, and merchandise, which may be in the public stores or bonded warehouses on the 1st of August, 1862, may be withdrawn for consumption upon payment of the duties now imposed thereon by law, provided the same shall be so withdrawn within three months from the date of original importation; but all goods, wares, and merchandise which shall remain in the public stores or bonded warehouse for more than three months from the date of original importation, if with-

drawn for consumption, . . . shall be subject to the duties prescribed by this act."

The twenty-second section of the same act repealed all inconsistent provisions of laws.

These goods were all in the predicament in which, by the language of the twenty-first section of this statute, they became subject to the duties imposed by that act.

They were all, as the statement of facts finds, in the public stores on the 1st of August, 1862. The defendants, therefore, under the provisions of the act of the 16th of July, might have withdrawn them for consumption, subject only to the duties assessed on them by the act of August 5, 1861, if, in making this withdrawal, they had complied with the conditions prescribed by the act of 1862, and had withdrawn them "within three months from the date of original importation."

They did not make any such withdrawal of any of the importations named, but suffered every one of them to remain in warehouse, after the expiration of three months from the date of its original importation, and made no withdrawal till after that period had elapsed. Every one of them is, therefore, by the precise language of this statute, subject to the additional duties imposed by the act of the 14th of July, 1862.

The true rule for the construction of statutes is, that the words are to be read according to their natural and obvious import, without either restricting or enlarging their meaning for the purpose of limiting or extending the operation of the statute. *Martin v. Hunter*, 1 Wheat. 326.

"Courts cannot correct what they may deem either excesses or omissions in legislation, nor relieve against the occasionally harsh operation of statutory provisions, without the danger of doing vastly more mischief than good." *Waller v. Harrie*, 20 Wend. 557.

The act is not properly a retroactive law. It is an act imposing new and additional duties, fixing the time when they shall take effect, a future day (the act was passed on the 14th of July, and went into effect on the 1st of August following), and saving the rights of importers already acquired under previous tariffs,

by permitting them to enter for consumption at the old rates of duty their goods in warehouse on the day the act took effect, and fixing the limit of time within which this privilege may be exercised, namely, three months from the date of the importation of the goods.

As a general rule, unless there is some other period fixed by the law itself, it takes effect upon its passage. But in statutes altering the duties on imported goods, as they affect business operations carried on at a distance, and when time is necessary to enable importers to act understandingly, it is usually considered wise and expedient for the legislature to fix some future day at which such statutes shall become operative.

Congress has undertaken to do this in the statute of July 14, 1862.

It has fixed the 1st of August, 1862, as the day when the new act shall take effect.

There is no constitutional objection to this construction of the statute of July, 1862, which subjects defendants' goods to duty.

The defendants' goods being in the custody of the customs officers at the time this act was passed, and on the day when it took effect, their importation was not then complete, and they were still subject to duty.

The importation of foreign goods is not complete, so long as they remain in the custody of the government, and until the final entry and delivery of the goods to the importer; until that time they are still subject to any duty on imports which Congress may see fit to impose on them.

Whether delivered to the importer or not, however, they were still imports and liable to duty as imports. *Brown v. Maryland*, 12 Wheat. 419, 438.

Even if the law under this construction did impose a double tax on the defendants' goods, it would be valid.

The only constitutional limitations on the power of Congress to lay taxes, necessary to be considered in this connection are:—

That the tax shall be for an object within the scope of the constitutional sovereignty of the United States. *Gibbons v. Ogden*, 9 Wheat. 198, 199.

That it shall be a tax of the kind authorized by the Constitution ; that it shall be uniform ; and, if a direct tax, that it shall be laid in the mode prescribed by the Constitution. Const. U. S., Art. I. §§ 8, 9 ; *Hylton v. The United States*, 3 Dal. 173.

Congress may tax and retax the same property, trade, or person without necessarily violating thereby its constitutional powers. It has done so more than once without objection.

The increased duty of fifty per cent on imports assessed by the resolve of April 29, 1864, was collected on all goods entered for consumption on or after that day, even though they had been entered in bond previous to its passage. 13 Stat. at Large, 405. The Tariff Act of June 30, 1864, recognizes this as the true construction of this resolve. 13 Stat. at Large, 216, §§ 19, 29.

The section of the statute under consideration, and the whole statute, purport to be and are an exercise of the power of taxation, not of the right of eminent domain ; and arguments drawn from that clause of the fifth article of the amendments to the Constitution, which provides that private property shall not be taken for public use without just compensation, and from consideration of the limits which this clause imposes on the exercise of this right, afford no light on the decision of this question.

The duties upon all imported goods constitute a personal debt due to the United States from the importer, independently of any lien on the goods themselves, and of any bond given for the duties ; and an action will lie in favor of the government against the importer for their recovery. *Meredith v. The United States*, 13 Pet. 486.

Assumpsit will lie for these duties as well as debt. *Meredith v. The United States*, 13 Pet. 486.

B. R. Curtis and *M. Andros*, for defendants.

Congress did not intend that the said act should have a retro-active operation.

If Congress did so intend, then so much of said act as increases the duties on merchandise actually imported, duly entered at the custom-house, warehoused, and the duties ascertained under previous acts of Congress, is unconstitutional, inoperative, and void:

It should be deemed that the legislature did not intend to enact a statute which in whole or in part, is inconsistent with the great principles of justice and right, is unjust, unequal in its operation, oppressive, and at variance with the principles of the jurisprudence of enlightened nations. Such a statute, or such a construction of a statute, is condemned in the most unqualified terms by the jurists, as well of the United States as of Europe.

“There is neither policy nor safety in retrospective laws ; and therefore I have always had a strong aversion against them. It may in general be truly observed of retrospective laws of every description, that they neither accord with sound legislation nor the fundamental principles of the social compact.” *Calder v. Bull*, 3 Dal. 395 ; Dwarries on Statutes, 540.

An *ex post facto* law, in the strict technical sense of the term, is usually understood to apply only to criminal cases, yet laws impairing previously acquired civil rights are equally within the reason of that prohibition, and equally to be condemned. *Dash v. Van Kleeck*, 7 Johns. 477. See *Society, &c. v. Wheeler*, 2 Gall. 139 ; *Benson v. Mayor of New York*, 10 Barb. 244 ; 1 Kent's Com. 455 ; *Ogden v. Saunders*, 12 Wheat. 262.

The right to duties, and the amount of the same vest in the government upon the arrival of the merchandise within the limits of a port of entry. *Arnold v. United States*, 9 Cran. 104 ; *United States v. Vowell*, 5 Cran. 368 ; *Prince v. The United States*, 2 Gall. 204 ; *Meredith v. The United States*, 13 Pet. 494.

Construed otherwise, the law is unjust and oppressive, because the amount of duties to be paid is made to depend upon a circumstance over which the defendants could have no control, and against which no prudence or sagacity could provide.

It is unequal in its operation, because the amount of duties depends upon the time of importation, instead of the time of warehousing, and it imposes a greater rate of duty upon warehoused goods of one merchant which may have been imported more than three months, than upon the warehoused goods of another merchant which were liable to the same duty under the same law, but who may have imported them a few days later.

The whole system of legislation upon the subject-matter is to be considered, and the different statutes considered together. It is an established rule of law that all acts in *pari materie* are to be taken together, as if they were one law, and they are directed to be compared in the construction of statutes, because they are considered as formed upon one system and having one object in view. *Dwarris on Statutes*, 569.

All the revenue laws, with the single exception of the act of July 14, 1862, operate prospectively. See 2 Stat. at Large, 299; 3 Stat. at Large, 310; 9 Stat. at Large, 42; 11 Stat. at Large, 192; 12 Stat. at Large, 179.

In the construction of a statute, it is the duty of an expositor to put such a sense upon the words that no innocent person shall receive damage by a literal construction. *Somerset v. Dighton*, 12 Mass. 384; *Murray v. Gibson*, 15 How. 421.

"Congress shall have power to lay and collect taxes, duties, imposts, and excises." Const. Art. I. § 8, clause 1.

Now Congress, having power to lay "duties" upon merchandise imported from a foreign country, exercised it by the act of 1861, and fixed the rate of duty on bar iron and steel. These duties accrued, and the right of the government to demand them vested, immediately when the goods were brought within the limits of a port of entry, as appears by the cases of *Arnold v. The United States*, 9 Cran. 104; *United States v. Vowell*, 5 Cran. 368.

It must, therefore, necessarily follow that the defendants had a right to demand and receive their merchandise upon the payment of these duties. The rights of the government and the rights of the importer, were, in this respect, equal. The duties having accrued, and having been paid, or secured to be paid, the merchandise ceased to be an import within the meaning of the revenue laws, and therefore ceased to be subject to any further or additional duty.

CLIFFORD, J. Duties were required, by the act establishing a warehousing system, passed the 6th of August, 1846, to be paid in cash. 9 Stat. at Large, 53. The same act made provision that whenever the owner, importer, or consignee made entry for ware-

housing, the same as therein directed, the goods so entered should be taken possession of by the collector and be deposited in the public stores, or in the other stores therein recognized and described. Both the duties and the expenses were required to be ascertained on due entry of the goods for warehousing, and they were to be secured by a bond of the owner, importer, or consignee, with surety or sureties, to the satisfaction of the collector, in double the amount of the duties; but the provision was, that the goods should be kept in these stores with due and reasonable care at the charge and risk of the owner, importer, consignee, or agent, subject at all times, however, to their order upon the payment of the proper duties and expenses. Provision was also made, that in case any goods deposited as aforesaid, should remain in public store beyond one year, without payment of the duties and charges thereon, then such goods shall be appraised and sold by the collector at public auction. The effect of the provision was, that the importer might, if he saw fit, enter his goods for warehousing instead of entering them for consumption, and paying the duties immediately; but if he elected to make the former entry and take the credit, he must submit to the conditions imposed, that is, the goods must remain in the possession of the collector, and he must give the bond required by the section. None of these regulations, however, amounted to a contract between the government and the importer, and of course they were all subject to modifications or repeal. Import duties were also required to be paid or secured to be paid, before a permit was granted for landing the goods. 1 Stat. at Large, § 62, p. 673. Sums not exceeding \$ 50 were required to be paid immediately, but it was at the option of the importer or importers, where the duties exceeded the sum of \$ 50, to pay or secure the same by bond. The terms of credit under that act were not always the same, varying from three months to two years, according to the nature of the importation and the place whence exported. Credit had always been given or allowed until the act of August 30, 1842, which provided in the twelfth section "that the duties on all imported goods shall be paid in cash." 5 Stat. at Large, 562. The same requirement is re-enacted in the act establishing the ware-

housing system, but it is there blended with all the other provisions to which reference has been made. The warehousing act, it will be remembered, allowed the goods to remain one year in warehouse before they were required to be entered for consumption ; but that provision was modified by the fourth section of the act of the 28th of March, 1854, and extended to three years from the date of the original importation. 10 Stat. at Large, 271. Important changes, however, were made in that behalf before the several importations embraced in this controversy were made, and some new provisions were enacted which it is necessary to notice. The fifth section of the act of the 5th of August, 1861, provides, that all goods actually on shipboard bound to the United States, and all goods on deposit in warehouses or public stores, at the date of the passage of the act, shall be subject to pay such duties as are provided by law, before and at the passage of this act. 12 Stat. at Large, 293. Annexed to those enactments are several provisions, of which two are of some importance. The first proviso is, that all goods deposited in public store or bonded warehouse after this act takes effect and goes into operation, if designed for consumption in the United States, must be withdrawn therefrom, or the duties thereon paid, in three months after the same are deposited. The second proviso is, that merchandise upon which the owner may have neglected to pay duties within three months from the time of the deposit, may be withdrawn and entered for consumption, at any time within two years of the time of its deposit, upon the payment of the legal duties with the addition of twenty-five per centum thereto. The rates of duties on imports were largely increased by the first section of that act, and yet the provisions of the fifth section were made applicable as well to goods on deposit in warehouses or public stores, as to goods actually on shipboard and bound to the United States. Defendants' importations each of them were made while that act was in force, and the several importations were entered for warehousing under the provisions of the Warehouse Act, and the several amendments thereto, as already explained. When the goods arrived, and the several entries for warehousing were made, the goods were subject to the duties prescribed by the last-

named Tariff Act, and the amount of the duties was ascertained in each case in accordance with the provisions. 12 Stat. at Large, p. 292, § 1. They were also deposited in warehouse under these provisions as amendments to the general warehousing system ; and the form of the bond given in each case was in strict conformity to its requirements. The parties concede the facts to be so, and indeed they were substantially so stated in the agreed statement, and therefore they cannot be controverted. The schedule annexed to the agreed statement shows, that the first entry for warehousing was made on the 28th of April, 1862, and that the last one was made on the 3d of July following ; but the agreed statement also shows, that all the goods of the several importations in question, were still in warehouse on the 14th of July of the same year, when the Tariff Act of that date increasing temporarily the duties on imports was passed. Additional duties were imposed by that act, under certain conditions, on goods previously imported and deposited and remaining in warehouse.

Defendants insist that the provisions of that act do not apply to any of the importations in this case ; and that is one of the principal questions presented for decision. The material provisions of the act, as applicable to the present inquiry, are, that all goods which may be in the public stores or bonded warehouse on the 1st of August, 1862, may be withdrawn for consumption upon payment of the duties now imposed thereon by law. But it also provides that all goods which shall remain in the public stores or bonded warehouse for more than three months from the date of original importation, if withdrawn for consumption, and all goods on shipboard on that day, shall be subject to the duties prescribed by this act. Warehoused goods might remain, under the provisions of the prior act, three months after the same were deposited, before they were required to be withdrawn from the warehouse or the duties thereon were required to be paid ; but the twenty-first section of the act under consideration changes the period allowed for the goods to be deposited without payment of duties, from three months after the same are deposited to three months from the date of original importations. The agreed

statement shows, that all the goods of the several importations of the defendants were in public store on the 1st of August, 1862, and consequently all of them were in the predicament in which, by the express language of the twenty-first section, they became subject to the duties imposed by that act. They were imported goods, entered for warehousing, and deposited in warehouse, remaining in public stores on the day fixed by the act, and neither the owner, importer, consignee, nor agents had paid the duties thereon, or withdrawn them from the warehouse, within three months from the date of original importation. Evidently they fall within every one of the conditions described in the act, and are plainly within its intent and meaning. Argument upon that subject is unnecessary, as the statement of the case affords a demonstration that the proposition of the defendants cannot be sustained.

The second proposition of the defendants is, that if Congress intended that the provisions of the act should apply to a case like the present, then so much of the act as increased the duties on the goods is unconstitutional, inoperative, and void. The views of the defendants are, that the provisions in the act of Congress under which these importations were made, giving them the right to withdraw their goods from warehouse within three months after the same were deposited, upon the payment of the duties specified in the act, was in the nature of a contract; that the government having allowed the merchant to import goods and to warehouse them, upon the condition that he would withdraw them within a certain time, and pay a certain rate of duty, and the amount of the duties having been ascertained by the proper officers of the customs, and the defendants having given bonds for that amount as required by law, their right to have the possession of the goods became valid upon complying with the conditions of the bond, and that Congress had no power to pass any act to divest them of that privilege. Congress has the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare; and it has not generally been supposed that the power conferred, if the taxes are uniform throughout the United States, has any

other limitation than the ability of the tax-payers, provided the power be exercised in a proper manner and for the legitimate purposes recognized in the Constitution. Using the language of the Constitution, "to lay" one tax implies no contract that another shall not be laid within the same year or within a shorter period. Congress may increase the tariff and increase the duties on imports at the commencement of its session, and if the public exigency requires it, they may do the same thing by still further increase in the rates at the close of their session. State legislatures, also, and municipal corporations, may raise taxes in such sums and at such times as in the judgment of the members the interests of those they represent may require; and the former may change the system of taxation as often as they see fit, unless it is otherwise provided in the State constitution. Events beyond control have made it necessary within a few years that taxes should follow taxes in rapid succession, but it cannot be admitted that they are any the less obligatory because the exactions are more frequent, and at far higher rates than in former years. The precise objection to the law in this case, however, is not only that the rates of duty are increased, but also that a change is made by the last act in the conditions under which the goods were deposited in warehouse. When deposited, the requirements of law were, that they must be withdrawn therefrom or the duties thereon paid in three months after the same were deposited; and the complaint is, that the new act which imposes the increased duty repeals or modifies that clause, and provides in effect that the withdrawal of the goods or the payment of the duties must be made within three months from the date of original importation. Assuming that the particular provision is a contract, then perhaps the objection taken to the modification would be entitled to weight; but if it is nothing more than a regulation of a privilege which Congress may withhold entirely, it is obvious that the complaint is without foundation. The exact language of the provision is, that all goods which may be in the public stores or bonded warehouse, on the day mentioned, may be withdrawn for consumption upon payment of the duties now imposed thereon by law, provided the same shall be so withdrawn within three months from the date of the origi-

nal importation. The change complained of is, that the period allowed for the withdrawal is limited to three months from the date of original importation, instead of three months from the time the goods were deposited. Such changes, however, have frequently been made in the different provisions upon the subject; and unless it be assumed that warehousing imported goods is a right, and not merely a privilege which may be granted or withheld, it is difficult to see on what ground the importer has any right to complain. One of the conditions of the bonds given was, that the importer would, on or before the expiration of three months, to be computed from the time when the goods were first deposited in public store or bonded warehouse, well and truly pay the amount of the duties as ascertained, to the collector of the port. The alternative condition was, that he should, in the mode prescribed by law, on or before the expiration of three months, withdraw the goods from the bonded store or public warehouse. Neither of these conditions affords any evidence that the government engaged that Congress would not revise the tariff laws, or would not increase or diminish the duties, nor that Congress would not make any changes in the warehousing system which the public interest might require. The ground of complaint is not that the importer has been required to pay the duties specified in the bonds earlier than he agreed to do, nor that he has been compelled to withdraw them before the time therein stipulated, but that Congress has increased the rates of duties upon imports, and made the new provision applicable to their goods previously deposited in warehouse. The theory of the defendants is, that the importation in each case was complete, and that the proceedings in making the entry for warehousing, deposit of the goods, and the giving of the bond, amount to a contract that the duties upon the goods so remaining in the possession of the collector should not be increased, and that none of the provisions of the warehouse laws should be so changed as to affect unfavorably their interests as owners of the goods. Neither of those propositions, however, can be sustained. The better opinion is, that the importation of foreign goods is not complete, as between the importer and the government, so long as the goods remain in

the custody of the officers of the customs, and that until they are delivered to the importer, whether on shipboard or in warehouse, they are subject to any duties on imports which Congress may see fit to impose. The practice of the government shows that goods in warehouse or on shipboard have always been regarded as subject to new legislation, both in respect to duties and in respect to alteration in the warehouse laws. The privilege of warehousing imported goods in certain cases was granted at a very early period in the history of the country. 1 Stat. at Large, 673. Option was given to the importers of teas, under the sixty-second section of the act of the 2d of March, 1799, either to secure the duties thereon, as in case of other importations, or to give bond to the collector of the district where the teas were landed, in double the amount, with condition for the payment of the duties in two years from the date of the bond. Whenever the importer elected to give the bond, the requirement was, that the goods were to be deposited, at the expense of the importers, in one or more storehouses, to be agreed upon between the importer and the inspector of the revenue. Two locks were required to be affixed to each storehouse, and the key of one was to be kept by the importer, and the key of the other by the government officer. Regulations to the same effect were enacted in the first section of the act of the 20th of April, 1818, in respect to the importation of wines and distilled spirits. 3 Stat. at Large, 469. The express condition was, if the importer elected to give the bond, that the goods should be deposited in such public or other storehouses as should be agreed upon between the importer and the surveyor, and the goods, as in the case of the importation of teas, were to be kept under the joint locks of the inspector and the importer. Duties under that act were to be paid in twelve calendar months from the date of the bond, and the collector was required to accept the bond without surety. Wool, or the manufactures of wool, or manufactures of which wool was a component part, might, under the sixth section of the act of July 14, 1832, be placed in the public stores under bond, at the risk of the importer, subject to the payment of the customary storage and charges, and to the payment of interest at the rate of six per

centum per annum while so stored. Payment of the duties on the articles so stored was required to be made, one half in three and one half in six months from the date of importation. The requirement in the twelfth section of the act of the 30th of August, 1842, was, that the duties on all imported goods after the act went into operation should be paid in cash; and in case of failure to pay the duties on completion of the entry, it was provided that the goods should be taken possession of by the collector and be deposited in the public stores, there to be kept, with due and reasonable care, at the charge and risk of the owner, importer, consignee, or agent. Such goods might remain in public store sixty days; but if they remained beyond that period, without the payment of the duties, they were required to be appraised and sold by the collector. 5 Stat. at Large, 562. Throughout these provisions the plain inference is, that Congress did not regard the importation as complete while the goods remained in the custody of the proper officers of the customs. Possession of the goods in every such case is retained by the government; and there can be no doubt that such goods are properly the subject of new legislation, both in respect to the duties on imports and in respect to the warehousing system. Repeated instances may be found where Congress has so legislated in addition to those already mentioned, and I am not aware that the power has ever before been called in question. The substantial effect of the new act was, that all imported goods, not then entered for consumption, whether in the foreign port or on shipboard, or in the public warehouses, were placed in the same category, and were subjected to the increased duties imposed by the act. The rights of the importer were saved by allowing him to withdraw his goods previously deposited, by paying the duties to which they were subject under the tariff acts in force when they were deposited, and at the time of the passage of the new act, provided they elected to make the withdrawal or pay the duties within the period therein specified. But they elected not to do so, and suffered the goods to remain in warehouse or in the public stores, and consequently the goods are subject to the increased duty.

Judgment for plaintiffs, according to the opinion of the court, and for costs.

NEW HAMPSHIRE DISTRICT.

MAY TERM, 1865.

JEREMIAH CAHART *et al.* v. CHARLES AUSTIN.

The claims of an original patent on reed musical instruments were as follows: "Making an exhausting-bellows for reed instruments, consisting of two chambers combined with each other, and with the reeds placed above, so that the chamber next the sounding-board shall be enlarged by a weight on the first flap, substantially as herein described, and exhausted by the action of the second flap," &c. The patent was twice reissued, and the claims thereof were as follows. Of the first reissue, "the combination of the reeds with an exhaust chamber of variable capacity, and an air-pump whose action exhausts and rarefies the air therein, — the exhaust-chamber tending to expand with a force that will balance the rarefaction to be preserved in the chamber." Of the second reissue, "so connecting the board which contains the reed seats, or perforations for the reeds, with the exhausting bellows, that it shall form substantially a part of the stationary leaf or cover of the exhaust-chamber thereof, while the exhausting or pumping chamber is placed in immediate connection with the said exhaust-chamber, without the intervention of tubes, thus improving the tone of the reeds, and expediting their speaking, and giving a compact, light, and graceful form to the instrument," etc. This last reissue also claimed the reed cells in combination with the reed seats, the concentrating chamber in combination with the reed cells and reed seats; the last two combinations, however, only when used with a suction or exhaust bellows. *Held*, that when viewed in connection with the descriptive parts of the specification, the claims of the last reissue, although showing some connection with the original patent, were still too widely different from it, and based to such an extent upon interpolations in the description of the last reissue, that they must be construed as embracing more than was described, claimed, or indicated in the original, that they were not for the invention therein described, and were void.

Where the claims of a reissue contain new patentable matters not shown in the original patent, and the same are so interwoven with other elements specified in the original, that they cannot be separated, no action can be maintained upon the original elements of the claim so constructed, but the entire reissued claim must be taken together.

In an application for a reissue, the decision of the commissioner, even in the absence of fraud, is not conclusive upon the question whether the improvements set out in the reissue are a substantive part of the invention secured in the original.

Comments on *Simpson v. Westchester R. R.*, 4 How. 404.

The commissioner's decision is not conclusive as to his own jurisdiction.

Neither has he any authority, pending an application for reissue, to hear testimony as to what the invention was, and allow the applicant to amend his claims and specification, so as to embrace whatever the proofs show he invented, although the reissue may thus show improvements neither described, suggested, nor indicated in the model, drawings, or specification of the original.

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The reissue is granted in order to amend a defective original specification; but unless it is for the same invention, the commissioner has no authority to grant it.

If it appear on the face of the two patents, by comparison, that the reissue is for a different invention from the original, the reissue is void.

In a reissue the patentee may redescribe or claim not only what was well described or claimed in the original, but also what was defectively set out, suggested or indicated in the drawings or specifications which properly belonged to the invention.

The privilege of reissue was not given to make patents more elastic or expansive, and therefore more available for the suppression of other inventions of the same class.

BILL in equity. Suit was brought to recover damages for the alleged infringement of a patent for an improvement in reed musical instruments. The patent was twice reissued, and was also extended. The original patent was entitled an improvement in bellows for musical instruments. It should be remarked that both reissues, in the descriptive portions thereof, contained statements upon the nature, characteristics, and object of the invention, which were enlarged and changed from those of the original. In the introductory portions of the opinion, the court characterized these changes as "extensive and radical." Cahart was the patentee, and the other complainants were assignees.

The defences may be thus classified:—

That the last reissue was void, because it was for a different invention from that set forth in the original patent.

That the patentee was not the original and first inventor of the improvement.

That the claims of the patent were insufficient to cover any combination or invention, and that therefore the patent was void.

That the improvements claimed in the last reissue were abandoned by the inventor.

The claims appended to the different issues of the patent, appear in the opinion.

C. M. Keller and *Causten Browne*, for complainants.

Edmund Burke and *A. Fletcher*, for respondents.

CLIFFORD, J. The first question presented involves the necessity of a careful examination of the specifications and claims of the several patents to which reference has been made. Specification annexed to the original patent describes the invention, not in the words employed in the patent itself, but as new and useful

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improvements in the bellows of that class of musical instruments called melodeons, seraphines, and æolian attachments. Prior to the invention of the patentee, as he states, in all instruments in which reeds were vibrated by a current or currents of air, the bellows was so constructed as to blow or force the current against the reeds, instead of drawing the current, by an exhausting action of the bellows, as in his method. The defects of the old method are very clearly pointed out in the specification, and it is shown very satisfactorily that these defects produced irregular tones, and of course diminished the value of the instrument. Tones in such instruments are regulated by the force of the current by which they are produced; and the patentee states that the objects of his invention are to produce a constant current of regular force, except when it is required to be increased to produce the swell, and so to arrange the parts as to occupy less room than by the modes heretofore practised. Detailed statement is then given of the means the patentee employs to effect those objects. Referring to that statement, it will be seen that he makes the bellows with two exhausting chambers, constructed, arranged, and operated as therein circumstantially described. Inventor further states, that his invention also consists in making the valves of the flap, by means of a piece or pieces of thin leather or other like material drawn over a hole or series of holes, and that the leather so placed is prevented from flapping when stretched by use, by the means of a strip of india-rubber over the middle of the valve. Particular description is also given of the drawings; and then follows a very elaborate explanation of the invention, which need not be reproduced. The principal claim of the patent is, "making an exhausting-bellows for reed instruments consisting of two chambers combined with each other and with reeds placed above, so that the chamber next the sounding-board shall be enlarged by a weight on the first flap and exhausted by the action of the second flap, substantially as described." Claim is also made in the patent for the method of making the valves by means of strips of leather or other material having like properties as described in the specification. Such was the description of the invention, as more fully set forth

in the original specification ; but new matters of very great importance are introduced into the amended specification of the second reissuc, on which the suit is founded. The patentee states, in the outset, that the object of his invention is to improve the tone of the reeds and to impart to them promptness and certainty in responding to the touch of the keys, and at the same time to give a compact and convenient and graceful form to the instrument. Radical change is also made in the description of the defects which existed in the instruments constructed prior to his invention. Some parts of the reeds, as the patentee now states, were uniformly found to be slow in speaking, and would often fail entirely, that is, they would either not speak at all or would give their tones out of tune. The sound of the reeds also was disagreeable and nasal, to such a degree, that the instruments could not be extensively introduced. The most radical change, however, is incorporated into the description of the construction and mode of operation of the instrument. The bellows, it is said, operates by exhaustion, and is constructed with two chambers, the one drawing the air from the other, the first having a tendency by weight or springs to expand with a force equal to about seven pounds to the square foot, and the other tending by similar means to close so as to expel the air within it. The upper leaf of the exhaust-chamber is firmly attached to the frame of the instrument, a little below the key-frame. Openings for the reeds are made through that board, and directly over each reed seat is a cap closely fitting upon the reed-board, forming a cell over the reed and reed openings, about the length of the reed. And the statement is, that this case is open at one end of the reed, and is closed at the other, and is in width and in depth about three eighths of an inch, but should be slightly increased for the large reeds and diminished for the small ones. Continuing the description, the patentee states that about three inches from the mouth of the reed cells and on the same leaf of the exhaust-chamber, he places a board in a vertical position, which he calls the concentrating-board, and as described, it extends to the ends and top of the instrument, thus forming a narrow chamber, open substantially at the top, but extending the whole length of

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the reed-board. The emphatic statement of the patentee is, that by the use of these cells on his bellows, the tone of the reeds is greatly improved and their speaking greatly accelerated, and that the concentrating chamber also much increases its richness. Whether new or old, it cannot be doubted that the improvements described may have a tendency to improve the tone and increase its richness; but the difficulty in the case is, that neither of them were described, suggested, or indicated in the specifications or drawings of the original patent. They are not amendments, but interpolations of the baldest and most unmistakable character, unsupported by anything to be found in the original patent, or even in the first reissue, as will more fully appear by attention to the claim of that patent. Undoubtedly the patentee made some advance in the work of expansion when he framed that specification, but the claim of the patent is altogether too narrow to support his present pretensions. As there stated, the claim is the combination of the reeds with an exhaust-chamber of variable capacity, and an air-pump whose action exhausts and rarefies the air therein, the exhaust-chamber tending to expand with a force that will balance the rarefaction to be preserved in the chamber for the purposes herein set forth. Reference is made to that claim merely to show the process of expansion, and the steps by which it was accomplished. Widely as that claim differs from the claims in the original patent, still the difference is very much less than between the claim of the original patent and those contained in the last reissue, on which the suit is founded. The last reissued patent has three claims, as follows: first claim is, so connecting the board which contains the reed seats or perforation for the reeds with the exhausting-bellows, that it shall form substantially a part of the stationary leaf or cover of the exhaust-chamber thereof, while the exhausting or pumping chamber is placed in immediate connection with the exhaust-chamber, without the intervention of tubes, thus improving the tone of the reeds and expediting their speaking, and giving a compact, light, and graceful form to the instrument, substantially as described; secondly, the patentee claims the reed cells, in combination with the reed seats, or openings,

substantially as described ; thirdly, he claims the concentrating chamber in combination with the reed cells and reed seats, substantially as described, but he claims the last two combinations, only when they are to be used with suction or exhaust-bellows, capable of producing a continuous current of air through the reed openings. Doubtless there is some trace of the invention, as described in the original patent, to be seen in the first claim, and yet it is obviously founded chiefly upon the interpolations contained in the specifications of the last reissue ; and the descriptive part is so mixed up with those new matters, that it is impossible to separate the one from the other, and consequently the whole must stand or fall together. The better opinion is, that where a patent contains several claims, and the invention covered by one of them is not new or is absolutely void, the patentee may maintain an action for the infringement of the patent so far as it regards the valid claims, although he did not make or record a disclaimer of the invalid or void claim before the commencement of the action. *Hall v. Wiles*, 2 Blatch. 194 ; *Vance v. Campbell*, 1 Black, 429. But the principle cannot be applied to this case, if it be true, that a patentee cannot embrace in his reissued patent any patentable improvements not described, suggested, or indicated in the specification or drawings of his original patent, because it is evident that even the first claim is mainly founded upon such new matters, and that those new matters are so interwoven with the descriptive portion of the claim that they cannot be separated from the other matters therein described, which correspond more nearly with the elements specified in the original patent. Complainants admit that the second and third claims are founded entirely upon these interpolations, and the admission is a very proper one, as the fact is so, beyond all controversy. Admission in the brief of the complainants is, that "neither in the specification, drawing, or model filed and remaining in the Patent Office, as part of the original application, do the devices covered by" those claims appear. Their position, however, is, that his invention as originally made did, as matter of fact, embrace those devices ; and they insist that the commissioner of patents, pending an application for a reissue, may hear

parol proofs as to what the invention was, and may allow the applicant so to amend his specification and the claims of his patent as to embrace everything which the proofs show that he actually invented, notwithstanding the reissue may include improvements neither described, suggested, nor indicated in the original model, application, specification, or drawings. The theory of the complainants in fact is, that the decision of the commissioner, except in cases of actual fraud, is conclusive that the new improvements described in the amended specification and included in the claims of the reissued patent were a substantive part of the invention secured in the original patent. Whenever the patent shall be inoperative or invalid by reason of a defective or insufficient description or specification, if the error has arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, and the payment to him of a certain duty, to cause a new patent to be issued to him for the same invention, for the residue of the period then unexpired, for which the original patent was granted. 5 Stat. at Large, § 13, p. 122. The proposition maintained by the complainants is, that the applicant for a reissue may offer parol proofs to show what his invention was, and that the decision of the commissioner, whatever it may be, is conclusive, except in cases of fraud. Support to that proposition is chiefly drawn from the case of *Stimpson v. Westchester Railroad Co.*, 4 How. 404; and it must be admitted that there are some remarks in the opinion of the court which give some countenance to that view of the law. Those remarks, however, were not necessary to the decision of the cause, and they must be received with some qualification, as the express requirement of the act of Congress is, that the reissue must be for the same invention. Unless the reissue is for the same invention, the commissioner has no power to grant it; and it cannot be maintained for a moment that the decision of the commissioner is conclusive as to his own jurisdiction. The patent in that case was for an invention or improvement in the application of the flanches of the wheels on one side of railroad carriages, and of the treads of the wheels on the other

side, to turn short curves upon railroads. Specifications of the patent being defective, it was surrendered, and reissued in order, as proved, to limit it and confine it to the turning of short curves in streets. Original patent was burnt with the Patent Office, and no part of the specifications was preserved, except what was published in a certain journal. Principal defect in the original patent was in regard to the grooves, and the witness called to prove the contents of the original patent testified that he thought that the grooves were alluded to in the original specification. Instructions of the court to the jury were, that the use of the grooves, which were described as a part of the invention in the reissued patent, was no part of the thing originally patented. Remarking upon that part of the charge the court say: Whether the new patent was substantially for a different invention from the first one, was a question for the jury, on the evidence, and there can be no doubt that the rule as stated was correct, as applied to that case. Error of the judge at that trial was, in ruling as law what, under the circumstances of the case, belonged to the jury. But the rule is otherwise if it appears on the face of the two patents by comparison that the reissue is for a different invention from that secured in the original patent. Such was the rulings of this court in the case of *Sickles v. Evans*, Mass. Dis., Oct. T. 1863; and in the case of *Goodyear v. The Providence Rubber Co.*, R. I. Dist. Nov. T. 1864; and I must adhere to that opinion until the question is otherwise settled by the Supreme Court. The commissioner in the case of the burnt patent had something to amend by if the witness was to be believed, and surely it was the duty of the court under those circumstances to submit the question to the jury, whether the original patent was or was not for the same invention. Neither the court nor bar pretended in that case that the decision of the commissioner was conclusive, but the question was, whether the decision belonged to the court or jury. Opinion of the court was delivered by the same judge in the case of *Battin et al. v. Taggart et al.*, 17 How. 83, which was decided eight years later. The supreme court say, in that case, that the reissued patent must be for the same invention substantially, though it be described in

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terms more precise than in the first patent. Under such circumstances a new and different invention cannot be claimed. But when the specification or claim is made so vaguely as to be inoperative and invalid, yet an amendment may give to it validity, and protect the rights of the patentee against subsequent infringement. Patents, say the court, in the case of *Burr v. Duryee*, 1 Wall. 575, had frequently been adjudged invalid prior to the Patent Act of 1836, from the insufficiency of the specification. The thirteenth section of that act was intended to remedy that evil, by permitting the patentee to surrender his defective patent, and have it renewed in proper form, "whenever it shall be inoperative or invalid by reason of a defective or insufficient description or specification"; but this privilege was not given to the patentee or his assignee in order that the patent may be rendered more elastic or expansive, and therefore more available for the suppression of all other inventions. Power is undoubtedly conferred upon the commissioner to allow the specification to be amended, if the patent is inoperative or invalid for the reason stated in the provision, and to reissue the patent in proper form. Pursuant to that authority he may doubtless allow the patentee to redescribe his invention, and to include in the description and claims of the patent, not only what was well described before, but whatever was suggested or indicated in the specification or drawings which properly belongs to the invention. Whether he can be permitted to go further, and resort to the original application and the model filed in the Patent Office, it is not now necessary to decide, as it is conceded that the improvements in question were neither suggested nor indicated in the application or model, nor in the specification or drawings. The additions made to the specification were interpolations, and not amendments, and consequently the commissioner had no authority to allow them to be made. Comparing the patents, it is clear on the face of the instruments, that the reissued patent is not for the same invention as that secured by the original patent, and therefore it is void. Having come to this conclusion, it is unnecessary to decide the other questions presented for decision.

Complainants are not entitled to relief. Bill of complaint dismissed with costs.

RHODE ISLAND DISTRICT.

NOVEMBER TERM, 1865.

THE COMMERCIAL STEAMBOAT COMPANY v. WILLIAM DUTTON *et al.*

A schooner was at anchor in good weather, on a clear day, and in a proper place in a harbor. The master of an in-coming steamer, supposing he could pass to one side of the anchored vessel, attempted so to do, but, in the attempt, his vessel touching the bottom, swung round and collided with the anchored vessel. *Held*, the master of the steamer was at fault in acting upon his own supposition, without proper investigation, that he could thus pass the schooner, and that the steamer was liable for the damage resulting from the accident.

ADMIRALTY appeal in a cause of collision. The libellants and appellees were the owners of the schooner *Adelaide*, and the appellants of the steamer *Falcon*. The schooner was lying at anchor in the harbor of Providence, between Crook Buoy and Field's Point; the steamer was entering the harbor coming from New York. The day was clear, without wind.

The defence was, that the schooner was in the channel, and the master of the steamer, seeing a number of vessels at anchor near the same place, supposed he could safely pass the schooner thus at anchor; but the fact was, there was not room in the channel, and the steamer touched bottom, and while endeavoring to back the steamer down the channel, she swung round (the water being so low that she would not steer) and collided with the schooner.

In the District Court a decree was entered in favor of the libellants.

A. Payne, for appellants.

G. H. Browne and *N. Van Slyck*, for appellees.

CLIFFORD, J. The collision occurred in good weather, and on a clear day, and it is plain that there must be fault on the part of one or the other of the two vessels.

The evidence shows that the schooner was at anchor, and there

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is no testimony that she was anchored in an improper place. The harbor regulations of the port of Providence proved that all vessels drawing over eight feet of water, approaching the harbor at any time other than at high tide, were required to come to anchor below the Crook, until the tide should allow them free passage. Irrespective of that regulation, however, it was the duty of the master of the steamer, seeing the schooner at anchor and in a helpless condition, to keep out of the way. The master, under the circumstances, had no right to act upon the erroneous supposition set up in the answer; and having done so, without any proper investigation, and a collision having occurred, the owners of the steamer are liable.

Decree of the District Court affirmed, with costs.

THE LONSDALE COMPANY v. MILES G. MOIES.

The decree of the court was, that the complainants were confirmed in their right and title to divert and use the water of a certain stream, through a canal, for mill or other uses, subject to the right of the respondent to use the water of said river for irrigation only, in accordance with a reservation in the deed under which the complainants claimed, and also by virtue of a certain agreement between the canal company and the grantor in the said deed; and that the cause be referred to a master to ascertain and report the amount of damage, if any, sustained by the complainants in consequence of the insertion by the respondent of a flume or culvert in the bank of the canal, as admitted in his answer; also, what structures were proper and needful to enable the respondent to enjoy and use the right to divert the water for the purpose of irrigation, in accordance with the reservation contained in the deed and the agreement. *Held*, that the decision of the master to the effect that the complainants were not entitled to any damages, was inconsistent with the decree which assumed that a wrongful act was charged in the bill and confessed in the answer, and therefore that the complainants were at least entitled to nominal damages. *Held*, also, that proper and needful structures, within the meaning of the decree, were not only such as would enable the respondent to enjoy and use the right to divert the water for the purpose of irrigation, but such as would enable him to do so, as far as practicable, consistent with the right of the complainants to insist that only so much water should be taken as might be reasonably necessary for that purpose; that the master erred in holding that it was not within his province to provide a safe preventative against any possible abuse of his right by the defendant: and that the cause must be again sent to the master under the present construction of the decree.

THIS was a bill in equity, and the case came before the court upon exceptions to the master's report. Decree having been

entered for the complainants in 1857, the cause was referred to a master, with certain directions hereinafter mentioned. The decree was in substance that the complainants were confirmed in their right and title to divert and use the water of the Blackstone River, in the county of Providence in this district, through a canal formerly known as the Blackstone Canal, for mill or other uses, at Lonsdale, in accordance with the conveyance by Simon Whipple to Wilbur Kelly, dated March 21, 1826, subject to the right of the respondent to use the water of said river for irrigation only, in accordance with a reservation contained in the said deed, and in accordance also with an agreement dated March 16, 1826, between the commissioners of the Blackstone Canal Company and the said Simon Whipple. The instrument called the agreement purported to grant to the said Whipple, his heirs and assigns, the privilege of taking water from said canal, when the water was running to waste or flowing over the dam or flash-boards thereof, sufficient for watering said interval land, to be drawn from said canal by three tunnels placed under the towing-path of said canal, the under side of said tunnels to be on a level with the top of the dam aforesaid, and not to exceed fifteen inches wide and six inches high, with slide-gates in the same to stop the run of water when not wanted for watering said land." The reservation in the deed was, "to said Whipple, his heirs and assigns forever, of the right of taking and drawing water either from the mill-pond by a trench, or through the Blackstone Canal banks, conformable to their agreement with me, whenever the water is running to waste over said dam, or flash-boards thereof, for the purpose of watering my interval land south of said Kelly's factory on the west side of the Blackstone River."

The decision of the court was, that the complainants had made good their title, as against the respondent, to divert the water of the Blackstone River, saving only what was reserved for the purposes of irrigation in the last-mentioned deed. In the present opinion the court said: "It will be observed that the deed referred to expressly recognizes the privilege granted to the grantor of the deed in the prior agreement, as the alternative right of

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taking and drawing water secured in the reservation. The language of the decree therefore corresponds with the decision of the court; and in both the right of the respondent to use the water of the river is declared to be for irrigation only, and only in accordance with the agreement, and the reservation of the same as contained in the deed." The duties of the master, to whose report exceptions were taken were described in the decree as follows: —

First, to ascertain and report the amount of damage, if any, sustained by the complainants in consequence of the insertion by the respondent of a flume or culvert in the bank of the canal, as admitted in his answer.

Second, to report what structures were proper and needful to enable the respondent to enjoy and use the right to divert the water for the purpose of irrigation, in accordance with the reservation contained in the deed, and the agreement referred to in the decree.

The following is the substance of those portions of the master's report necessary to be reproduced in this statement: —

Three tunnels had existed in the bank or tow-path of the Blackstone Canal since 1827, for irrigation upon the Whipple meadow. In 1852, the defendant substituted a flume or gateway with a sliding gate, for the central tunnel, the same being at the same height at the bottom as the former tunnel; assuming that, as the Blackstone Canal Corporation had been dissolved, and the tow-path had reverted to him, the agreement had become obsolete, but that his right to the water under the reservation remained unimpaired. Upon this the litigation between the parties commenced.

The grounds of the claim for damages, within the scope of the master's commission, was the following: —

That the said flume was so unskillfully and insecurely constructed by the defendant that the complainants' interests at Lonsdale were greatly imperilled, and that they were obliged to expend labor and materials in improving the structure.

That the defendant, in March, 1852, inserted in the bank or tow-path of the canal a flume of much larger dimensions and

greater capacity than the tunnel, and that through the said flume a quantity of water passed more than what could flow through the tunnel, to the damage of the complainants of from \$1,000 to \$1,500 per annum. Upon this the master reported that the ground for an estimate of the damages was too vague and insufficient; that the injury, if any, was *damnum absque injuria*; and that the complainants were not entitled even to nominal damages.

As to the structures proper and needful to enable the defendant to enjoy and use the right to divert the water for irrigation purposes, the following recommendations were made:—

First, that the defendant henceforth draw his supply of water for irrigation through only two orifices: one at the flume, the other at some point between that flume and the lower or southernmost tunnel; economy and convenience, as well as the topography of the premises, dictating this arrangement.

Second, that these orifices be securely constructed and inserted in or under the bank, the bottoms of which respectively shall be at such a height relatively to the Ashton dam, as that the water will flow into them whenever it is running over the Ashton dam proper (i. e. its cap-log), let the current in the canal be as rapid as it can be made by any conceivable management or use of water or water power at Lonsdale, or any improvements in the canal itself, at its mouth, or at the dam.

Third, that said tunnels respectively each be of dimensions not exceeding twenty-two and a half inches in width and six inches in height, “with slide-gates to stop the run of water when not wanted for watering said” meadow.

The master further reported it not to be within the scope of his duties to provide against any possible future abuse of his rights by the defendant.

Exceptions to the report were filed by the complainants, in which objection was taken to the fact that the master had assumed that the decree referred to him the construction of both the “reservation” and the “agreement”; whereas the court had already decided the rights of the parties under both. They also excepted to his ruling that no damages were recoverable by complainants, to his construction of the reservation and agree-

ment, and to his decision as to what structures were necessary to enable the defendant to enjoy his right of irrigation.

These exceptions, twelve in number, were overruled by the court, excepting the fifth, ninth, and tenth, which were as follows:—

Fifth Exception. For that said master in and by his said report finds and awards no damages for the complainants, and rules that the injuries sustained by them are among the class known in the law as *damna absque injuria*, or among those to which the maxim *de minimis, &c.* applies; to which finding and ruling complainants except, as contrary to law and unsound in principle, and because said master should have ruled that complainants have sustained damage recognized by law, and should have estimated and awarded to the complainants the amount of such damage.

Ninth Exception. For that said master, in and by his said report, has ruled and reported as structures needful to enable the defendant to enjoy his rights, two tunnels, as specified in his said report, and has neglected therein to provide any means by which the improper flow of water through the same can be checked by the complainants, or on their behalf; whereas said master should have reported some means whereby such improper, unwarranted, and injurious withdrawing of the water could be prevented by them, or in their behalf.

Tenth Exception. For that said master, in and by his said report, has decided and ruled, that under said decree, "it is not his province to provide a safe preventative against a possible abuse of his right by the defendant," in exercising his right of irrigation through the two structures, as provided and recommended by said master in his said report, and has also neglected to provide any safeguard against such abuse; to which ruling and omission so to provide safeguards, the complainants except as erroneous in point of law, and of fact as highly injurious and dangerous to the rights and interests of the complainants, and as contrary to the scope of the decree under which said master alone can act.

The deraignment of title, so far as the same is necessary to be recited, appears in the opinion of the court.

B. R. Curtis, W. H. Potter, S. Ames, W. Binney, for complainants.

T. A. Jenckes, for respondent.

CLIFFORD, J. Nothing can be more certain than the fact that the decree recognizes and declares the right of the respondent to divert water from the mill-pond or through the Blackstone Canal banks for the purposes of irrigation. The limitation to the exercise of the right for that purpose, as stated in the decree of the court, is, that it must be in accordance with the reservation contained in the deed, and in accordance with the described agreement.

The authority of the master was conferred by the decree in the cause, and in the performance of his duties he was bound by its terms. The citation of authorities to support that proposition is unnecessary, as it is one universally acknowledged. Some reference to the instruments of title under which the respective parties claim will be necessary, in order to understand the nature of the present controversy, although both parties claim to derive their title from the same source. Prior to the 11th of December, 1809, Simon Whipple owned the whole estate in controversy; but the record shows that on that day he conveyed twenty thirty second ($\frac{2}{3}\frac{0}{2}$) parts of two tracts of land to his associates in the Smithfield Cotton and Woollen Manufacturing Company, without any reservation whatever. One of those tracts was situated in Cumberland and the other in Smithfield, in this State, as appears by the recitals of the deed. The record also shows that his associates on the same day conveyed to him twenty thirty-second parts ($\frac{2}{3}\frac{0}{2}$) "of half the water to water the land of the said Simon Whipple, on the Smithfield side of the river, and for no other purpose," which may be raised by a dam to be erected by the company over Pawtucket River, leaving at the same time so much of the water raised as aforesaid as will be at all times sufficient to carry all the water-wheels necessary to work all the machinery in all the factories, mills, and other water-works which may at any time hereafter be by said company erected on any parts of the two lots of land described in the before-mentioned deed of the same, together with the right and privilege of draw-

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ing from said dam half said water for the purposes aforesaid, and conveying the same through any part of the Smithfield lot, provided the manner of taking out the water and conveying the same and the direction thereof shall be the most beneficial to the grantee and the least injurious to the grantors. The court said: "Reference is made to that deed, not only as showing the origin of the right to divert and use the water for irrigation, but as showing conclusively that the right at that period of time rested in grant, and not merely in reservation." The owner of the two tracts conveyed, by the deed referred to, only twenty thirty-second parts of the two tracts, as is obvious from the terms of the deed. The effect of the arrangement was, that the grantee retained the title to twelve thirty-second ($\frac{12}{32}$) parts of the tracts in himself, while he conveyed eight such parts to George Olney, two to George Smith, one to Thomas Arnold, five to Joseph Wilkinson, two to William Whipple, and two to Joseph Whipple, 2d, making thirty-two in all. The parties to the deed, including the grantor and grantees, entered into an agreement on the same day, reciting that they had formed themselves into a company for the purpose of manufacturing cotton and woollen goods, and agreed that each should hold as many shares of the capital stock of the company as he held parts or shares of the two tracts of land as specified in the deed. Passing through various mesne conveyances, the entire title to the premises, on the 1st of February, 1825, became vested in Wilbur Kelly, subject to the right and privilege of the original owner of the same, to water his land on the Smithfield side of the river as set forth in the deed from his associates to him, to which reference has been made. Before the last of these conveyances was made, however, the record shows that the Blackstone Canal Company had been duly incorporated, both by the legislature of this State and by the legislature of the Commonwealth of Massachusetts. The original owner of the premises, with others, granted to that company in September, 1823, the right and privilege of constructing their canal over his land and estate in Smithfield, adjoining and south of the manufactory of Wilbur Kelly, on the west side of the Blackstone River, provided it was built not more than seventy feet wide.

Consequent upon that license, which was irrevocable, the canal company granted to the said Whipple, on the 16th of March, 1826, his heirs and assigns, the privilege of taking water from said canal, when the water is running to waste or flowing over the dam or flash-board thereof, sufficient for watering said interval land, to be drawn from said canal by three tunnels placed under the towing-path of said canal, the under side of said tunnels to be on a level with the top of the dam aforesaid, and not to exceed fifteen inches in width and six inches in height, with slide-gates in the same to stop the flow of water when not wanted for watering said land. The said agreement recites that "said Whipple had the right of drawing and using the water from the mill-pond of said manufactory, to be taken by a trench to the interval land of said Whipple south of said manufactory on the west side of said river, and that by the construction of the said canal the said trench for watering said land would be interrupted and destroyed." The antecedent right of said Whipple is also expressly recognized and admitted in one of the recitals of the consideration for the grant, in which it is stated that he had the right to use the waste water from said mill-dam and pond for watering his said land. The language of the reservation contained in the deed referred to in the decree is equally explicit and comprehensive. The grantor reserves to himself, his heirs, and assigns forever, the right of taking and drawing water either from the mill-pond by a trench, or through the Blackstone Canal banks, conformably to the agreement of the 16th of March, 1826, whenever the water is running to waste over the said dam or flash-boards thereof, for the purpose of watering the described interval land south of said Kelly's factory, on the west side of the Blackstone River.

Recurring to the decree of this court, it is obvious that the first duty of the master was to ascertain and report the amount of damage, if any, sustained by the complainants, in consequence of the insertion of the flume or culvert in the banks of the said canal by the respondent, as confessed in his answer. The conclusion of the master under this direction was, that the complainants are not entitled to any damages for the reasons stated in

his report; but after careful examination of the subject, I am not able to concur in that conclusion. The conclusion, I think, is inconsistent with the decree of the court, which assumes that a wrongful act was charged in the bill of complaint, and that the allegation was confessed in the answer. Assuming the fact to be so, then the complainants were at least entitled to nominal damages. The second duty of the master was to report what structures are proper and needful to enable the respondent to enjoy and use the right to divert water for the purpose of irrigation, as specified in the decree. The master is correct, in the judgment of this court, in holding that reference must be had both to the reservation and the agreement, in order to ascertain the rights of the parties in this controversy. *Lonsdale Company v. Moies*, 21 Law Rep. 658.

The interlocutory decree entered under the order of this court is to that effect, and such undoubtedly is the true construction of the instruments. The reservation contained in the deed expressly adopts the agreement as defining the alternative right of the respondent, and the case would be no stronger in favor of that construction if the words of the agreement were recited in the reservation. Adopting that rule, the court is clear that the respondent holds the right of taking and drawing water either from the mill-pond by a trench, or through the banks of the canal, as provided in the agreement, whenever the water is running to waste over said dam or the flash-boards thereof, for the purpose of watering the interval land described in the respective instruments. The words of the reservation are, "whenever the water is running to waste over said dam or flash-boards thereof"; but the language of the agreement is, "when the water is running to waste, or flowing over the dam or flash-boards," showing that the water is running to waste within the meaning of the instruments whenever it is running over the dam or flash-boards. The respondent has the right to take and draw the water as waste water whenever it runs over the cap-log of the dam, for the purpose described; and although he undeniably has the right also to take and draw the water when running over the flash-boards, still the complainants, when the head is sufficient to run over the cap-log, cannot by the use of flash-boards to increase the height

of the dam, restrict his right to take and draw the water. The meaning of the instruments is, that the right of the respondent to take and draw water attaches, when the head of the water is such, that if unobstructed by flash-boards, it would run over the cap-log of the dam, and it is equally certain that the right does not cease to attach because the head is sufficient, not only to run over the cap-log, but over the flash-boards, which usually add more than a foot to the height of the dam. On the other hand, while it is true that the respondent can take and draw the water for the described purpose whenever it runs over the cap-log of the dam, still he can only use it for that purpose, and only so much as may reasonably be necessary for that purpose. The agreement provides for three tunnels placed under the tow-path of the canal, and that the under side of the tunnels shall be on a level with the top of the dam.

The opinion of the court is, that the under side of the orifices, whatever they may be, should be on a level with the top of the cap-log of the dam, and that they should not exceed in all the maximum dimensions prescribed in the agreement. But a continuous flow of the water is not contemplated, because the agreement provides that the tunnels therein mentioned shall be constructed "with slide-gates in the same to stop the run of the water when not wanted for watering said land."

Proper and needful structures, within the meaning of the decree, are not only such as will enable the respondent to enjoy and use the right to divert the water for the purpose of irrigation, but such as will enable him to do so, as far as reasonably practicable, in consistency with the right of the complainants that only so much water shall be so taken and drawn as may be reasonably necessary for that purpose. Looking at the subject in that light, it is quite clear that it is the duty of the master to inquire into the subject, and, if reasonably practicable, to report such structures as will conform to the rights of both parties. The fifth, ninth, and tenth exceptions are sustained, and all the rest are overruled. Under the circumstances the cause must be again sent to the Master, with instructions to hear the parties under the former decree, as explained and construed in the present opinion of the court.

MAINE DISTRICT.

APRIL TERM, 1866.

WILLIAM BUSH, Libellant, v. SCHOONER ALONZO. THOMAS
HAGGET, Claimant and Appellant.

Where a mariner who had shipped for a specified voyage, was cruelly treated and beaten and threatened, in repeated instances, by the master, and in consequence, through fear, left the vessel at a port before the voyage was ended, *held*, that he was justified in so doing, and that the voyage, as to his contract, was ended.

An action, therefore, by the libellant for his wages, cannot be defeated upon the ground that he had not served out the voyage, but had wilfully deserted.

A party not appealing from the decision of the District Court can, in this court, only be heard in support of the decree of the court below.

ADMIRALTY appeal in a cause of subtraction of wages. On the 8th of December, 1864, the libellant shipped as cook and steward on board the schooner Alonzo, for a voyage to Nassau, thence to a port or ports in the West Indies, North or South America, the United States, or any ports or places wherever freight and employment might be found, but finally to a port of discharge in the British Provinces, not exceeding twelve months.

The vessel proceeded to Havana, thence to Tampico, thence back to Havana in ballast, and there having taken in a cargo of sugars, sailed for the port of Portland in this district, arriving on the 10th of July, 1865, and was discharging cargo when the libel was filed.

The libel charged that the libellant was cruelly treated and kicked by the master without justifiable cause, and from malice, hatred, and revenge; that the treatment was such that he could no longer remain on the vessel for fear of his life; that on the 10th of July, 1865, the master ordered him to leave the ship, threatened to kill him if he did not, and on the 14th of the same month discharged him from duty.

These charges were denied in the answer, and the following

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defences set up: that the voyage was not ended; that libellant was incompetent, negligent, and wasteful in the performance of his duty; that the master found it necessary to disrate him; that he did not earn his board either before or after he was disrated; and that he wilfully deserted the vessel without justifiable cause.

In the District Court a decree was entered for the libellant, for \$88.75, with costs.

G. F. Talbot, for libellant.

J. H. Drummond, for respondent, cited *Steele v. Thacher*, Ware, 91; *United States v. Freeman*, 4 Mas. 505; *Sherwood v. McIntosh*, Ware, 109; *Ward v. Ames*, 9 Johns. 187; *Knowlton v. Bots*, 1 Sprague's Dec. 163; *Magee v. The Ship Moss*, Gilpin, 228; Abb. on Ship. 644; *Turner's Case*, Ware, 83.

CLIFFORD, J. The principal questions presented for decision are questions of fact, as is obvious from the analysis given of the libel and answer. Libellant alleges that he was discharged by the master, and, if so, then he is entitled to recover the balance, if any, due him for his wages. Respondent denies that proposition, and alleges that the libellant deserted without any justifiable cause; and if that is true, then it is clear that the libellant is not entitled to recover anything. These opposite theories cannot both be true, and it is necessary to examine the testimony to determine which is correct. Legal discharge, however, is not the only ground of claim set up by the libellant. He claims to recover on that ground, but he also claims that he is entitled to recover, even if the court finds that he voluntarily left the ship, because, as he alleges, he was repeatedly punished by the master from hatred, malice, and revenge, and without any justifiable cause; that he was so cruelly beaten and kicked by the master during his service on the schooner that he was rendered helpless for a time, and that he was justified in leaving the ship because his life was in danger. Considering the case a clear one, I shall not enter into any extended examination of the evidence. Parties must be content with brief explanations as to the conclusions of the court in matters of fact, as they cannot be benefited by extended argu-

ment. The proofs do not warrant the conclusion that the libellant was technically discharged, but they do show that he was cruelly beaten and kicked by the master during the voyage without any justifiable cause, and that he left the ship for fear of further wanton injury from the master, and that he had reasonable grounds for his fears. Those grounds were the repeated punishments he had received from the master during the voyage without justifiable cause, and the threats of the master after the schooner arrived on this coast. The statement of libellant is, that the master, on the 10th of July, 1865, said to him that he had a good mind to break his bones or knock him overboard, and that he would kill him if he did not leave the ship when she arrived in port. Under that threat he left the ship; and I am clearly of the opinion that he was justified in leaving. Suffice it to say, without repeating the testimony, the threats as stated are satisfactorily proved, and there is no reason to doubt that the previous cruel treatment and his threats combined induced the seaman to leave as alleged in the libel. Being justified in leaving the ship, the voyage as to his contract is ended, and his rights are the same as if he had been technically discharged. *Emerson v. Howland*, 1 Mas. 45; *The Exeter*, 2 Rob. 261; *The Rovena*, Ware, 323; *Brig Cadmus*, 2 Paine, 229.

Repeated acts of cruelty and oppression on the part of the master, especially if accompanied by threats of death or enormous bodily harm, will justify a seaman in leaving the ship before the voyage is ended. *Steele v. Thacher*, Ware, 91; *Sherwood v. McIntosh*, Ware, 109.

Evidently, therefore, the suit cannot be defeated upon the ground that the voyage was not ended, nor upon the ground that the libellant wilfully deserted the ship. The charges of incapacity, negligence, and wastefulness are not satisfactorily proved. On the contrary, I am of the opinion that if he really was discharged as alleged, that he was improperly discharged, and that he was entitled to the wages for which he contracted in the shipping articles. Whether nominally disrated or not, he was still more or less employed as cook and steward, and is entitled to his wages. Appellee insists that he is entitled to a greater

sum than was allowed by the District Court, but he did not appeal from the decree, and cannot be heard except in support of it. *Cairey v. Merrill*, 2 Cur. 8; *Allen v. Hitch*, 2 Cur. 147; *Stratton v. Jarvis*, 8 Pet. 4; *Canter v. American Insurance Company*, 3 Pet. 318.

Most of the matters of fact have been fully argued by the counsel on the one side and the other, and in deciding the cause the court has been greatly assisted by those arguments; but it cannot be expected that the opinion of the court will contain much more than the conclusion of the court upon matters of fact.

The decree of the District Court is affirmed, with costs.

DAVID CROWEL *et als.*, Libellants, v. THE BARK RADAMA.
WILLIAM FORBES *et als.*, Claimants and Appellants.

A schooner was heading southwest by south, a bark north-northwest, with the wind west. The bark was close-hauled on the wind, the schooner running six points off, having the wind somewhat free. The bark was seen from the schooner when at a distance of about two miles, off the weather bow, at which time the helm was hove up and the vessel kept off. The schooner was discovered from the bark when the vessels were about seven or eight hundred yards apart, three points on the bark's weather bow, at which time her helm was put hard up. When the vessels came together the schooner was heading east, the bark northeast or east-northeast. The bow of the bark struck the schooner by the main rigging, on the starboard side. *Held*, that the bark was responsible for the damages occasioned by the collision.

The rule applicable to this case is, that when two vessels are approaching each other from opposite directions, that one which has the wind free, or is sailing before or with the wind, must keep out of the way, and the one close-hauled must keep her course.

Where, in consequence of a collision, the injured vessel drifted ashore, and \$1,600 was paid to salvors, the decree of the District Court in awarding \$488 on account of salvage was sustained.

ADMIRALTY appeal in a cause of collision. The libel was *in rem* against the bark Radama, and the libellants were the owners of the schooner Montezuma, of Beverly, in the district of Massachusetts. The bark sailed from the port of New York on the 10th of January, 1864, bound on a voyage to the port of Port

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land in this district, and the schooner from Salem on the following day, on a voyage to Cayenne in South America. The libel alleged that the officer of the deck, in charge of the schooner on the 11th of January, off Cape Cod, between seven and eight o'clock in the evening, discovered the bark off the weather bow, showing a red light; that the wind was west; that the schooner was heading southeast by south; that the bark was heading north-northwest; that the master seeing the light ordered the schooner to be kept off, which was done. Under this order, it was alleged, the schooner gave way sufficient to have cleared the bark, but when the two vessels had approached near each other, the master of the bark seized the wheel of his vessel and hove it hard up, which caused the bark to come down upon the schooner, carrying away her main rigging on the starboard side, and otherwise injuring her, so that she drifted ashore; that she was damaged to the amount of \$ 300, and her cargo to the same amount; and that the sum of \$ 1,600 was awarded to the salvors of the vessel who got her off and run her into port.

The owners of the bark alleged, in their answer, that the schooner was discovered when the vessels were about seven or eight hundred yards apart, and that she was three points on the weather bow of the bark; that the helm of the bark was put hard up, but that the helm of the schooner was put to starboard, and that the schooner attempted to run across the bows of the bark, and thereby occasioned the collision.

The decree of the District Court was to the effect that the collision occurred as alleged in the libel; that the bark was solely in fault; and the court awarded damages in the sum of \$ 987 to the libellants.

W. F. Choate and *Fessenden & Butler*, for libellants.

J. and E. M. Rand, for claimants.

CLIFFORD, J. Much less conflict exists in this case than is frequently found in cases of this description. The pleadings and proofs show that the two vessels were sailing in nearly opposite directions. The collision occurred at the time and place alleged in the libel. It was not a dark night, and the wind was west, and blowing a good smart breeze. Both vessels were well

manned and equipped, and both had proper lookouts and sufficient lights, and the proof is full to the point that each saw the other in ample time to have avoided the collision. Any argument is, therefore, unnecessary to show that it is a cause of fault, as the collision occurred in the open sea, and without any circumstances appearing to indicate that it might not have been prevented by a proper observance of the usual and well-known rules of navigation applicable to the case. The bark was heading north-northwest, and the schooner was heading southeast by south, but the bark was close-hauled on the wind, and the schooner was running six points off, which made her somewhat free. The testimony shows that the schooner saw the bark before the bark saw the schooner, but the latter was seen by the former when they were half a mile apart, and in season to have adopted every proper precaution to have avoided a collision. Where two vessels are approaching each other from opposite or nearly opposite directions, the fact that each does not discover the other at the same moment cannot materially affect the question as to which was in fault, if each made the discovery of the approach of the other in season to adopt every necessary precaution. The bark was the larger vessel, and being without cargo, she was light in the water, and she was seen by the schooner when the two vessels were two miles apart. Those on board the schooner testify that her helm was put up as soon as the bark was seen, and that she immediately began to give way.

Doubts are entertained whether that statement can be regarded as entirely correct, but the proofs are satisfactory that the helm was seasonably put up, and that the schooner had given way five or six points, if not more, before the collision occurred. The respondents concede that when she was first seen by those on board the bark, she was heading southeast by south; and it is fully proved that when the collision occurred, or shortly after, she was heading east. A corresponding change was made in the course of the bark. When first discovered, she was heading north-northwest, and it is clearly shown that at the time the collision occurred she was heading northeast, or perhaps east-northeast. Both vessels gave way, and as they were sailing in opposite directions, it is

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not difficult to see how the collision occurred. Unquestionably there is some conflict in the testimony as to the bearing of the respective vessels towards each other at the time the one first discovered the other, but it is not material to determine that controverted point, as it is clear that both gave way, and that the bark struck the schooner at amidships on the starboard side. A discussion upon the law of the case is unnecessary, as the rule is well settled that a vessel which has the wind free or is sailing before or with the wind, where two vessels are approaching from opposite directions, must keep out of the way of the approaching vessel, if the latter is close-hauled. *St. John v. Paine*, 10 How. 557; *Schooner Catharine*, 17 How. 170; *Osprey*, Sprague's Dec. 251. The correlative duty of the vessel close-hauled is to keep her course, so that the vessel whose duty it is to keep out of the way may not be baffled or defeated in her attempt to perform her duty. *Mail Steamship Co. v. Rumball*, 21 How. 384. Exceptional cases may arise, as was admitted in that case, but there is nothing in this record to take the case out of the general rule. On the contrary, the means adopted by the schooner to keep out of the way were the usual and proper means, and it is not doubted by the court that they would have been sufficient if the bark had held her course, as she was bound to do. She did not do so, and consequently it must be held that she was in fault and responsible for the consequences. The reasons for this conclusion might be very much extended, but as the question is merely one of fact, it is not thought necessary to pursue the investigation. The respondents also contend that the damages allowed in the District Court were excessive. The complaint in that behalf is twofold: first, they contend that the amount allowed for the injuries to the vessel was more than sufficient to make good the damage; secondly, that the District Court erred in allowing anything for salvage, because the crew unnecessarily and improperly abandoned the vessel. The positive testimony of one of the owners was, that he paid out for the repairs on the vessel the sum of \$504, and the District Court allowed that sum. The testimony of the owner was, that she was not as good after being repaired as she was before the collision. Suffice it to say that the allow-

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ance was substantially correct, if the witness was entitled to credit. In view of all the circumstances, I am of the opinion that I ought not to reverse the decree on that ground. The second ground of complaint is, that the District Court erred in allowing the salvage. The amount allowed was only \$483; and I am not able to see that there is any error in the decree of the District Court.

One may now see that self-preservation did not require the crew to abandon the vessel, but they had to determine that fact when the collision occurred, and at a time when the extent of the injuries to their vessel was not known. Believing that their vessel was very seriously damaged, they went on board the bark; and it does not appear that the officers and crew of the bark thought at the time that their course was an improper one. Looking at all the circumstances, I cannot say that their conduct was such as to impeach their motives, or their fidelity to their duty. The decree of the District Court is, therefore, affirmed, with costs.

MASSACHUSETTS DISTRICT.

MAY TERM, 1866.

THE DENTAL VULCANITE COMPANY v. ISAAC J. WETHERBEE.

Certain persons in Massachusetts associated themselves together, prior to the filing of the bill in this case, by articles of agreement in writing, and formed a corporation by the name used in the bill of complaint, to manufacture and sell certain articles under letters-patent which were by the inventor assigned to the company. It was contended that the associates were not a corporation under the Gen. Stat. Mass. chap. lxi. p. 341. The defence was not set up in the answer to the bill, but defendant gave notice of his intention to plead the same in bar of the suit. *Held*, that such defence must be pleaded in abatement, not in bar, and could not be put in under the general issue.

Corporations may have the same remedies at law or in equity as natural persons; and the general issue pleaded to a suit brought by the corporation is an admission of its corporate existence.

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The entire interest in a patent was assigned by the inventor, and subsequent to such assignment an application for reissue was signed by and the reissue granted to him. *Held*, that in the absence of fraud or concealment it could not be said that the reissue was void, the assignment being duly recorded in the Patent Office, and the surrender having been made with the knowledge and consent of the assignee.

Under such circumstances a mere wrongdoer cannot defend himself against the charge of infringement by proving that the proceedings which led to the reissue were irregular, unless it be shown that the proceedings were contrary to law, or that the patent was granted to the wrong party.

The act of Congress does not in terms require that a surrender shall be in writing.

Where it appeared that a person was employed by an alleged inventor to make experiments upon the invention, and that such employee before that time had tried a single imperfect experiment; that previous to such person being employed, the alleged inventor had filed a caveat upon the invention; that a contract was entered into between the two, in which the patentee was treated as inventor and the other party as an employee, and the employee had never in his lifetime made any claim as the inventor; *Held*, that although the experiments were conducted to a successful issue, the person employed could be considered neither a sole nor joint inventor of the improvement.

An application for a patent was first made in 1855, and rejected, on appeal to the Commissioner, in 1856. No further appeal or new application was made till March 25, 1864, when a second application was made, which was successful. Between 1856 and 1864 the invention had gone into public use with the inventor's knowledge and consent, as shown in the testimony, and the inventor had made certain assignments and sales of interests in the invention. *Held*, that these facts did not show actual abandonment.

Delays in the Patent Office, which the inventor cannot prevent, should not under any circumstances affect the validity of his patent when granted.

BILL in equity founded upon letters-patent for a new and useful improvement in artificial gums and palates. Pending the suit and subsequently to the filing of the answer the patent was twice reissued. Subsequent to the last reissue the complainants filed a supplemental bill of complaint, to which answer was duly made, and the cause was fully heard upon pleadings and proofs.

The original patent was granted to John A. Cummings, June 7, 1864, and on the June following it was assigned to the complainants. In October following the first bill was filed, and in December the respondent answered. The first reissue was granted to the inventor, and not to the assignees as it should have been, but on return to the Patent Office the error was corrected. The second reissue was to correct a date erroneously given in the first, and was granted to the complainants at the request of the inventor and original patentee. The petition for the second surrender and reissue was also signed by the original patentee, and in terms purported to surrender the original patent instead of

the first reissue. The date of the first reissue was January 10, 1865; that of the second, March 21, same year.

It appeared that John A. Cummings first made an application for a patent for his invention in 1855, and that the same was, after three examinations, finally rejected, upon appeal, by the commissioner of patents, in 1856. The application was not further appealed, and was not renewed till March 25, 1864, when a new application was filed, upon which the patent issued. In the interval between the filing of the original application and that of 1864, the invention had gone into use to a considerable extent, with the knowledge and consent of the then applicant proved thereto; and it also appeared that during the same interval the inventor had made certain assignments of interests in the invention. Certain letters of the patentee and other evidence were introduced, tending to show that the inventor had not relinquished his design of obtaining a patent at any time between the date of the original application and the final allowance of the patents.

It was urged by the defence that the Dental Vulcanite Company was not a corporation under the laws of Massachusetts, as claimed in the bill; that being an association of persons, they had not conformed to the State statute regulating such associations, either in their proceedings for organization or in their subsequent acts and doings; that the alleged inventor was not the original and first inventor of the improvement; that he had after application abandoned his invention, because the same had gone into public use before the patent was finally obtained. It was also objected that the plaintiff company did not carry on the manufacturing business within the meaning of chapter sixty-one of the General Statutes of Massachusetts.

A person by the name of Bevin was employed by the inventor to experiment upon the invention, and through him it was conducted to a successful issue. Previous to his employment, Bevin had made an imperfect experiment, and a caveat had been filed by the alleged inventor in his own name. It was urged in defence that Bevin was the real inventor.

B. R. Curtis, Causten Browne, and J. E. Maynardier, for complainants.

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Whatever force there may be in the alleged misfeasance or nonfeasance of the complainant corporation, and whatever its effect in other proceedings, it cannot avail in this suit where the complainant is a legal corporation, holding the legal title to this patent, and in a suit against a third party a mere wrongdoer.

As to validity of the first reissue, see *Gayler v. Wilder*, 10 How. 477; *Woodworth v. Stone*, 3 Story, 750.

The second reissue was to correct a date erroneously given in the first one, and was granted directly to the Dental Vulcanite Company as Cummings's assignee; but the petition making the surrender and asking for the second reissue was irregular in two particulars: it in terms surrendered the original patent instead of the first reissue; and it was signed by Cummings, who had assigned his whole interest, instead of by the company his assignees.

The surrender in terms of the original patent instead of the first reissue was a clerical error which the commissioner rightly corrected of his own motion. The first reissue was that which was surrendered in fact, and was the only grant in existence to be surrendered. Or the error in question may be regarded as simply a misdescription of the thing surrendered, the identity of the thing itself being incapable of being mistaken.

There is no requirement of law that a patent should be surrendered by writing. This is provided for by rule for convenience and for certainty. But a mere manual delivery of the old patent by the person entitled to surrender it, or by his agent, with intention to surrender, and an acceptance and cancellation by the commissioner and the issuing of new letters-patent for the same invention on an amended specification, would clearly be a substantial execution of the law providing for reissues.

Upon the question of abandonment, *Godfrey v. Eames*, 1 Wall. S. C. 317, and *Adams v. Jones*, Grier, J. Nov. T. 1859, Western District of Pennsylvania, were cited.

A. F. Badger, *G. S. Boutwell*, and *Joel Giles*, for respondent.

The Dental Vulcanite Company is not a legally organized corporation. Gen. Stat. c. 61, §§ 1 and 6; Stat. 1851, c. 133, §§ 1 and 6; Stat. 1852, c. 9, §§ 1 and 2; Gen. Stat. c. 61, § 5; and Gen. Stat. c. 60, § 14.

The original patent, dated June 7, 1864, was not lawfully issued and delivered to Cummings.

Cummings made an application for a patent for substantially the same thing, April 12, 1855, which was rejected finally, February 6, 1856, in which decision Cummings acquiesced without appeal, and made no new application till March 25, 1864.

If the rejection was an error, the neglect of Cummings to appeal to a judge of the Circuit Court for the District of Columbia for a period of more than eight years was a bar to further proceedings either by appeal or by renewal of his application. Stat. 1836, c. 357, § 7; Stat. 1839, c. 88, § 11; Stat. 1852, c. 107, § 1; Law's Digest, p. 148, § 55; and Judge Merrick's opinion (MS.), *Raymond*, *ex parte*.

An application for a patent in the sense of the patent law is an entirety, embracing all that should be done by the applicant until his application terminates in a final rejection or in the grant of a patent; and neglect to prosecute his application for more than two years is an abandonment of his invention to the public. Stat. 1861, § 12; *Godfrey v. Eames*, 1 Wall. 317; Rules of Patent Office in force in 1855, §§ 37 - 39, 105.

The applicant may make as many applications as he pleases at any time not more than two years subsequent to the time of the public use of the invention.

Cummings acquiesced in the final decision of the commissioner, February 6, 1856, and the subsequent and general use of the article claimed by Cummings having been by his consent and allowance, he must be held in law to have abandoned his invention, even if his claim to be the original and first inventor were not disputed. R. 11, § 10; *Kendall v. Winsor*, 21 How. 329, and Law's Digest, 95, § 31; *Pennock v. Dialogue*, 2 Pet. 1; Robb's Pat. Cases, Vol. I. 545, 567; *Shaw v. Cooper*, 7 Pet. 292; Robb's Pat. Cases, Vol. I. 675, 680.

Sales of the invention justify the inference of abandonment.

The application of March 25, 1864, was a new application, and was so treated by the applicant, and by the Patent Office, while in fact the art of forming the plate, in which artificial teeth are

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inserted, of hard rubber, had been generally practised for more than two years. Stat. March 2, 1861, c. 88, § 10.

The reissues of the patent to Cummings, dated January 10, 1865, and March 21, 1865, were not made according to law.

Because the original patent of June 7, 1864, was surrendered by Cummings who did not own it; and the reissue of January 10, 1865, was granted to Cummings, and not to the Dental Vulcanite Company, and has never been surrendered; and the reissue of March 21, 1865, was granted upon the surrender by Cummings, of said original patent of June 7, 1864, which he did not own, and which did not then exist.

A void act cannot be made good by a subsequent approval; the material act in a reissue is the surrender of the existing patent by the owner. If that be void the proceedings of the government in the grant of a reissue are null.

CLIFFORD, J. Certain preliminary objections have been made by the respondent to the right of the complainants to maintain the suit, which will first be considered.

Respondent contends that the complainants are not a corporation as alleged in the bill of complaint. They claim to be a corporation legally organized under the law of the State. General Statutes, c. 61, p. 341. Section one of that chapter provides, among other things, that "three or more persons, who shall have associated themselves together by articles of agreement in writing for the purpose of . . . carrying on any mechanical, mining, quarrying, or manufacturing business . . . and shall have complied with the provisions of this chapter, shall be and remain a corporation under any name indicating their corporate character assumed in their articles of agreement which is not previously in use by any other corporation or company." Under that provision, the persons claiming to constitute the corporation complainants associated themselves together, prior to the filing of the original bill of complaint, by articles of agreement in writing, and formed the corporation by the name assumed in the bill of complaint, to manufacture and sell "artificial gums and palates of vulcanite or hard rubber, under letters-patent granted John A. Cummings, dated June 7, 1864,

and assigned to said corporation." No such defence was set up in the original answer of the respondent, but he gave notice on the 2d of January, 1865, that he should insist in bar of the suit that the complainants were not a corporation legally organized under the laws of the State, and he repeated that allegation in his supplemental answer. Some of the objections taken to the proceedings were overruled at the hearing, and therefore will not be made the subject of remark. The principal objections which remain open are: 1. That the business of the company, as declared in the articles of association, is not a manufacturing business within the true intent and meaning of the provision to which reference has been made; and, 2. That the company does not in point of fact manufacture the alleged improvement, nor carry on any manufacturing business. Strong doubts are entertained whether there is any merit in the objections, even if it be admitted that such a defence if valid may be pleaded in bar as well as in abatement. Doubtless the nature of the improvement is such that it is necessarily made to order; but it is difficult to see how that circumstance can divest the patented article of the character of a manufacture. Manufacturers often work to order, and it is not perceived that it can make any difference in respect to the question under consideration whether the article was made for sale, or was made to order, as in either case it is manufactured before it is actually sold. Licenses are granted by the complainants, as appears by the allegations in the bill of complaint; but there is also evidence in the case which shows that they have agents who manufacture the patented article. They complied in form with the requirements of the statute, and inasmuch as the authorities of the State have not called the validity of their organization in question, it cannot be admitted that a mere wrongdoer can set up such a defect, if it be one, as a justification of his wrongful acts. But it is not necessary to place the decision of the court upon either of those grounds, as it is clearly settled by the Supreme Court that such a defence must be pleaded in abatement, and that it cannot be pleaded in bar, nor be given in evidence under the general issue. Corporations may have the same remedies at law or in equity as natural persons, and the

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rule established by the Supreme Court is, that if the defendant plead the general issue in a suit brought by a corporation, it is an admission of the corporate existence of the plaintiffs, and dispenses with the necessity of any proof on their part to sustain that allegation. By pleading to the merits, said Judge Story, in the case of *Conard v. The Atlantic Ins. Co.*, 1 Pet. 450, the defendant necessarily admitted the capacity of the plaintiffs to sue. If he intended to take that exception, it should have been done by a plea in abatement, and his omission to do so was a waiver of the objection. *Kane v. Paul*, 14 Pet. 41; *Childress v. Emory*, 8 Wheat. 642. Reference was made in the argument to the fact that the respondent, on the 2d of January, 1865, in the paper filed at that time, giving notice of additional matters of defence not specified in the original answers, states that he will insist in bar of the suit that the plaintiffs are not a corporation legally organized under the laws of the State; but the paper having been filed without leave to amend cannot be regarded as an amendment to the original answer. Looking at the objection in any point of view, we are of the opinion that it cannot be sustained.

Objection is also made by the respondent to the proceedings of the Patent Office on granting both the first and the second reissued patents, and he insists that the errors were of such a character that the last reissued patent is void. Recurring to the dates, it will be seen that the assignment to the complainants was prior to the surrender of the original patent; and the record shows that the instrument of assignment was on file in the Patent Office when the application for the reissue was presented. Fraud is not imputed, and there is no pretence of intentional error or concealment. The errors suggested are: 1. That the application for the first reissue was signed by the original patentee; and, 2. That the Patent Office in the first instance actually granted the reissue to the applicant. Whether the mistake was first discovered by the Patent Office or by the party named as patentee does not appear, but it does appear that the letters-patent were immediately returned to the commissioner, and that the mistake was corrected as a clerical error. Unless it could be

corrected as a clerical error, it could not be corrected at all, as it was clearly not a case falling within the provision authorizing a surrender and reissue. Rules of the Patent Office furnish a form of an application for the surrender of a patent; but the act of Congress does not in terms require that it shall be in writing. Patents may doubtless be surrendered on petition or by delivery as the rules of the Patent Office may prescribe, and in the cases specified in the act of Congress a new patent may be issued to the original inventor, or, in case of an assignment, to his assignees. Where the assignment covers the whole interest of the inventor, present and prospective, it is undoubtedly more regular that the application for the surrender should be made by the assignee; but, even in that case, it cannot be admitted that the reissue is void, if the assignment was duly recorded in the Patent Office, and the application for the surrender and reissue was made with the knowledge and consent of the assignee. Letters-patent must in all cases conform to the requirements in the act of Congress; but where the reissued patent is correct in form, and there is no proof of fraud, intentional error, or concealment, a mere wrongdoer cannot defend himself against the charge of infringement by proving that the proceedings which led to the reissue were irregular, unless it be shown that the proceedings were contrary to law, or that the patent was granted to the wrong party. Correction of the error in this case was made by the commissioner at the request of the assignor of the patent; and he stated in the same communication that the assignment to the complainants was on record in the Patent Office.

The second surrender was asked merely to correct an error of date in the first reissue; and it is obvious that the suggestion of error was well founded, and that the correction requested was one proper to be made. Two errors also are suggested in the proceedings which led to the second reissue: 1. That the application for the surrender of the patent was signed by the original inventor; and, 2. That the patent described in the application for the surrender was the original patent, instead of the first reissue, as it should have been. Evidently the first objection is without merit, as the application to surrender the patent referred

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to the assignment, and contained the request that the new patent might be issued to the complainants. Pursuant to that request, the reissue was granted; and the complainants, having adopted the surrender and accepted the new patent, are estopped to deny either the authority of the applicant or that of the commissioner. See *Surrender*, 1 Com. Dig. 1; 10 Coke, 67, b; *Shep. Touch.* 301-303. Complaint certainly cannot be made by the applicant, because it was his own act; and it is equally clear that the government cannot be heard to complain, because there is but one patent in existence for the invention, and the commissioner had full knowledge of all the circumstances.

The remaining preliminary objection is, that the description of the patent in the application for the surrender was erroneous. Suppose that is so, still it is apparent that all the papers were before the commissioner, and that he had full knowledge of all the circumstances and of what the patentees desired to accomplish. The averment of the answer is merely that the reissues were not made according to law; but it is not alleged or proved that there is any error in the records of the Patent Office, except what appears in the application for the surrender. The statement in the patent is, that the first reissue was surrendered and cancelled; and, in the absence of any proof to the contrary, the presumption of law is, that the statement as there made is correct, and that the surrender was made according to law and the rules of the Patent Office.

Coming to the merits of the case, it becomes necessary to ascertain the character of the invention, and the true construction of the patent. Present suit is founded upon the second reissued patent. Claim of the patent is, "The plate of hard rubber or vulcanite, or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described." The invention is designated in the patent as a new and useful improvement in artificial gums and palates; but it is described in the beginning of the specification as a new and useful improvement in plates for artificial teeth, which, perhaps, is the better general description. Adopting the usual order, the inventor, in the first place, points out the objections to and inconveniences in the old mode

of attaching artificial teeth to a metallic plate, and of fitting the same to the roof of the mouth. . They are, as stated, that the metal was expensive, and that the plate, being hard and unyielding, was apt to injure the mouth, and that its tendency was to impede mastication and obstruct articulation. He then proceeds to say that his invention consists in forming the plate, to which the teeth or teeth and gums are attached, of hard rubber or vulcanite, so called; and describes the hard rubber or vulcanite as an elastic material, possessing and retaining, when used in that way, sufficient rigidity for the purpose of mastication, and being pliable enough at the same time to yield a little to the motions of the mouth. Description is then given of the manner of making the hard-rubber plates, from which it appears that impressions are taken of the mouth, or that part of it the plate is to fit, of wax or plaster, in the same manner as is usually practised in the construction of gold plates for artificial teeth. Superadded to that is also a description of the means employed in setting and securing the teeth, or also of the kinds of teeth which may be employed. They are set in place and adjusted to the proper distance and fulness in the same manner as practised in setting teeth in gold plates. But they are provided with pins projecting in such a manner that the rubber will close around them and hold them secure in position. When completed, the plaster mould, with the teeth set as described, is carefully filled with soft rubber, and the same is made secure in its position by placing another plaster mould over it, and while in that condition it is heated or baked in an oven or in some other suitable way. The statement of the patentee is, that the soft rubber or gum is to be compounded with sulphur, &c., in the manner prescribed in the hard-rubber patent, and is to be subjected to sufficient heat to vulcanize or harden it, as directed in that patent. Unless the soft rubber is colored when purchased from the owner of the hard-rubber patent, it is also to be colored in imitation of the natural gums by mixing it with vermilion or other suitable coloring matter while in the soft state. After the plate has been heated or baked sufficiently to convert it into hard rubber, the mould is removed and the plate is then polished for use. The

claim of the patent conforms to the description of the invention as given in the specification ; and it is not perceived that any form of words can render it more definite.

Several defences are set up by the respondent upon the merits ; but the one most pressed at the argument was, that the assignor of the complainants is not the original and first inventor of the improvement described in the patent. The assignees hold the patent, and they have introduced it in evidence ; and having done so, the presumption on that issue is in favor of the complainants. Letters-patent are granted by public authority, and when issued, and regular in form, the presumption is that the power was rightly exercised ; and he who alleges the contrary must prove it. Considering the mass of testimony and documentary proofs upon this issue, it is deemed inexpedient to do much more than to state our conclusions. Neither party would be benefited by an attempt to remark upon all the proofs in the case, and it would necessarily extend the opinion to an unreasonable length. Suffice it to say we have carefully examined the evidence, and, in view of all the facts and circumstances, are fully satisfied that the original patentee, in the contemplation of the patent law, was the original and first inventor of the improvement described in that patent. The respondent contends that the improvement was made by F. A. Bevin, or that the latter was at least a joint inventor with the original patentee. But it is not possible to sustain the first branch of the proposition, because the evidence introduced for that purpose is not sufficient to change the burden of proof, as it fails to show that the person named ever did anything before he was employed by the original patentee, more than try a single imperfect experiment. On the other hand it clearly appears that the original patentee had filed his caveat in the Patent Office before he had even made the acquaintance of the person supposed by the respondent to be the inventor of the improvement. Such a theory finds no satisfactory support in the proofs, and it is dismissed without further remark. Undoubtedly Bevin went into the employment of the original patentee in the fall of 1853, or early in 1854 ; but he went abroad in the spring of 1854, and did not return till the

fall of that year. When he returned, he commenced, under the directions of the original patentee, the manufacture of hard-rubber plates. They entered into a written contract on the 2d of April, 1855; and the terms of that instrument show that both parties regarded the invention as belonging to the original patentee. By the terms of the instrument it appears that the original patentee had filed a caveat, preparatory to taking letters-patent, and that the other party had already rendered services in perfecting the invention. Substance of the agreement was, that Cummings should furnish all the pecuniary means, have the results, and that Bevin should make the experiments, and be entitled to one third of the interest. But the whole instrument treats Cummings as the inventor and Bevin as the employee. The same conclusion is drawn from the correspondence in the case, which is quite too voluminous to be reproduced. All the conduct of Bevin speaks the same language, and that remark is especially true of his conduct when Cummings was about to apply for a patent. His certificates given at that time are quite decisive, not only that he did not regard himself as a prior inventor to the original patentee, but that he did not even claim or pretend to be a joint inventor as is supposed by the respondent. He never made any such claim in his lifetime, and no such claim has been made by his legal representatives since his decease. Our conclusion is that the defence on this point is not made out.

The next objection to be noticed is, that the inventor abandoned his invention because his application for a patent, which was made April 12, 1855, was rejected February 6, 1856, and because he did not appeal at all or make any new application until the 25th of March, 1864. Strong doubts are entertained whether any new application was necessary; but if it was, it is believed to be well settled that the second application must be regarded as having been filed in aid of the first, on which the rejection took place. *Godfrey v. Eames*, 1 Wall. S. C. 317.

Actual abandonment is not satisfactorily proved; and it is not possible to hold that any use of the invention without the consent of the inventor, while his application for a patent was pending in

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the Patent Office, can defeat the operation of the letters-patent after they are duly granted. Such delays are sufficiently onerous to a meritorious inventor if his patent is allowed to have full operation after it is granted, but it would be very great injustice to hold that any delay which the inventor could not prevent, should under any circumstances affect the validity of his patent.

Another objection is, that the second reissued patent is not for the same invention as that described in the original specification. Comparing the two instruments, it is not perceived that there is any substantial difference between them in respect to anything embraced in the invention. The directions are more specific in the reissued patent, but there does not appear to be any such change in the description of the invention as will support the objection taken by the respondent.

Passing over certain minor objections, it only remains to ascertain whether the charge of infringement is maintained. Charge of the bill of complaint is, that the respondent has manufactured, used, and sold, and still continues to manufacture, use, and sell, many artificial gums and palates embracing the improvement and invention described in the letters-patent of the complainants. The reference in the supplemental answer is to the original answer, and it is the conclusion of the court that the latter, in legal contemplation, admits the charge of infringement.

Complainants are entitled to a decree for an account and for an injunction.

MAINE DISTRICT.

SEPTEMBER TERM, 1866.

DANIEL BURNHAM v. EDWARD L. O. ADAMS.

A person being arrested by virtue of an execution issued on a judgment recovered against him in the Supreme Court of Maine, having given the bond provided in the 22d section of chapter 113 of the Revised Statutes of that State, and having cited the creditor before two justices of the peace and quorum, and having submitted himself to examination, is not entitled, before his disclosure is completed, to surrender himself into the custody of the jailer of the county where he was arrested, and there complete, before the same justices' court, the disclosure began before the surrender.

If, under such circumstances, the justices decide that the debtor is entitled to the benefit of the oath provided in the 28th section, and deliver to him the certificate prescribed in section 31, the debtor is not entitled to recover in an action of trespass for damages against the jailer for refusing to release him.

MOTION for new trial. Action of trespass against the defendant as jailer of Cumberland County, to recover damages for an alleged illegal imprisonment of the plaintiff, who was arrested by virtue of an execution issued on a judgment obtained against him by one Isaac Dyer, in the Supreme Court of the State. When arrested, the present plaintiff, Burnham, gave bond as provided in the 22d section of the 113th chapter of the Revised Statutes of Maine, and subsequently, in accordance with the provisions of that section, cited the creditor before two justices of the peace and quorum, and submitted himself to examination as a poor debtor, with the view of taking the oath and obtaining the discharge provided for in the 32d section of the same chapter. The bond thus given under the statute contained three conditions, namely, that within six months thereafter the execution debtor should thus cite the creditor and submit himself to examination and take the oath prescribed, or pay the debt, costs, and fees arising in the execution, or deliver himself into the custody of the keeper of the jail to which he was liable to be committed under the execution.

Burnham cited the creditor, and the justices organized their court, and the disclosure progressed for several days ; but the six months limited in the bond being about to expire, he, as he had a right to do, changed the method of complying with the conditions of the bond from the first-named to the third, and surrendered himself on the execution, by a formal surrender in writing, to the keeper of the jail in the county of Cumberland, where he was arrested. The justice's court then adjourned their sitting to the jail in which the debtor was confined by reason of his surrender, and there concluded the disclosure, deciding that the debtor was entitled to the benefits of the oath provided in the 113th chapter, and ordered his discharge. The jailer (the present defendant) refused to release the prisoner, and hence this action. Plea was the general issue. At the close of the plaintiff's testimony in this suit, the court instructed the jury that in judgment of law the plaintiff was not entitled to recover, and directed a verdict for defendant, subject to the opinion of the court upon questions of law. The ground of the motion for new trial was error in the instructions of the court.

The 23d section of the 113th chapter of the Revised Statutes before referred to, provides a mode of procedure for a disclosure when the debtor is in jail on execution issued against him, namely, he may apply to a justice of the county, or, at his request, the jailer shall apply for him, upon which similar steps are taken as when the debtor has given bond.

H. L. Whitcomb, for plaintiff.

It was the imperative duty of the jailer to discharge the debtor on his filing with him the discharge of the justices. Rev. Stat. Me. c. 113, § 32.

The jailer could not go behind the certificate of the justices, and he had no discretion to determine whether the discharge was properly or improperly granted. No want of jurisdiction appeared from the certificate ; and the jailer is not a court to revise the proceedings of the justices' court.

The object of the Poor Debtors' Act is to place the debtor where the creditors may examine him, which object was completely fulfilled in this case.

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J. D. Fessenden and *W. H. Clifford*, for defendant.

The question is, whether the debtor, being in jail on an execution in a civil suit, complied with the requirements of the statute regulating the manner of his discharge.

The method of proceeding is explained in c. 113, § 23, Rev. Stat. Me., namely, the debtor, "who is in jail on an execution in a civil suit, may apply to a justice of the peace and quorum, &c., or, at his request the jailer shall apply for him." No such application was made. The disclosure was commenced under a different provision of the 113th chapter, namely, section 22; but the debtor not having begun his disclosure sufficiently early within the six months limited in his bond to be enabled to complete it, chose, in order to release the sureties to comply with its conditions, not by completing the disclosure, but by surrendering himself. The bond was thus discharged; and being the basis of the proceedings for that disclosure, the disclosure could legally proceed no further. To the altered circumstances in which the debtor placed himself, different provisions of the statute became applicable. See *State v. Hall*, 49 Me. 412.

The justices' court that administered the oath to Burnham was not organized to release him from jail, but to comply with one of the conditions of his bond; and he, by surrendering himself, relinquished the attempt to save the bond by disclosure, but discharged it by compliance with another of its alternative conditions, namely, going to jail. The Supreme Court of this State has decided the question in *Garland v. Williams*, 49 Me. 18.

CLIFFORD, J. Such a motion as this is properly addressed to the judge's minutes, which cannot be controlled, not even by the agreement of the parties, without the concurrence of the court. Where there is no dispute about the facts, however, the practice of reducing the facts to an agreed statement as a means to prevent misrecollection is without objection. The parties in this case have reduced the facts to writing, and the agreed statement appears to be correct.

[At this point the court rehearsed the facts substantially as they appear in the statement.]

The views of the plaintiff are, that the discharge by the jus-

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tices was valid, and that it entitled him to a discharge from prison. Dyer recovered judgment against him, on which execution was duly issued, and he was arrested on that execution. Persons so arrested may be released by giving bond to the creditor for double the sum for which they are arrested, with surety or sureties, approved as required, and proceeding as provided in the act for the relief of poor debtors. The conditions of the bond are required to be that he will, within six months thereafter, cite the creditor before two justices of the peace and of the quorum; submit himself to examination and take the oath prescribed in section twenty-eight; pay the debts, interest, costs, and fees arising in said execution; or, deliver himself into the custody of the keeper of the jail to which he is liable to be committed under said execution. Execution debtors giving such a bond may fulfil the conditions, and discharge the same, and thereby relieve their sureties on the bond, in any one of three ways: first, they may cite the creditor as required, submit themselves to examination, and take the prescribed oath; second, they may pay the debt, interest, costs, and fees arising in the execution; third, they may deliver themselves into the custody of the keeper of the jail to which they are liable to be committed under said execution. The right of choice is in the debtor, and the case shows that he selected the first mode. The requirement in that case is, that he "shall apply in writing within the time limited in his bond, to a justice of the peace in the county where he was arrested," claiming the benefit of the oath, authorized in section twenty-eight; and the provision is, that the justice shall appoint a time and place for his examination, and issue a citation to the creditor under his hand and seal." Due service must be made, as provided, and the examination must be before two justices of the peace and quorum for the county; and if on such examination and hearing the justices are satisfied that the debtor's disclosure is true, and they do not discover anything therein inconsistent with his taking the oath, they may administer it to him. Rev. Stat. 640. In this case the debtor cited the creditor, and the justices organized the court, and the disclosure progressed for several days. But the six months limited in the

bond being about to expire, the plaintiff, as he had a right to do, changed his mind, and elected to pursue the third mode to fulfil the condition of the bond, and accordingly voluntarily surrendered himself on the execution, by a formal surrender in writing, to the keeper of the jail in the county of Cumberland, where he was wher arrested. When he thus surrendered himself, and was taken into custody by the jailer, he was legally imprisoned under the execution, and the prior bond which he had given was discharged. Neither he nor his sureties were any longer liable on that bond. They had fulfilled its conditions, and it was *functus officio*. The imprisonment of the plaintiff commenced at the date of his committal, made in pursuance of his voluntary surrender. The prior proceedings before the justices were based on the bond given to release the debtor from the arrest made by the officer, and not on the imprisonment of the plaintiff, which took place subsequently. Those proceedings legally came to an end when the debtor elected to fulfil the conditions of the bond by delivering himself into the custody of the keeper of the jail, and that determination had been carried into effect. Such surrender, and commitment in pursuance of it, has the effect to change the character of the debtor, as he then becomes a debtor not under arrest by an officer, or under bond to cite the creditor, but a debtor imprisoned in the jail, liable to perpetual imprisonment unless he gives a new bond, or is discharged in some of the modes provided by law. Being in jail he may still apply to a justice of the same county, or at his request, the jailer shall apply in his behalf, claiming the benefit of the poor debtors' oath. The form of the certificate to be given by the justices as evidence of the discharge of the debtor is different in the latter case from that in the former. Independently, therefore, of any decision, I am of the opinion that by the true construction of the Poor Debtors' Act, the proceedings of the justices, after the voluntary surrender and commitment of the plaintiff, were without any legal effect and void; but the decision of the Supreme Court of the State is to the same effect, and that, I think, ought to be regarded as conclusive. *Garland v. Williams*, 49 Me. 18.

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Reference is made to the fact that the judges were not unanimous, but that cannot make any difference, as the opinion of the majority is the opinion of the court.

Judgment on the verdict.

SEPTEMBER TERM, 1866.

SAMUEL B. LOCKE, Plaintiff in Error, v. THE UNITED STATES.

Courts are not inclined to grant a new trial merely on account of ambiguity in the charge to the jury, when it appears that the complaining party made no effort at the trial to have the point explained.

When goods are purchased in a foreign country, for importation into the United States, and in quantity sufficient to load several vessels, under the act of March 3, 1863 (2 Stat. at Large, 737), an invoice executed in triplicate must be produced and exhibited to the American consul at or before each shipment, and where the importation is by rail, the same rule applies to each train of one or more cars laden with the dutiable goods.

Exceptions to the charge of the presiding judge, on the ground that the language employed was ambiguous, cannot be sustained when the complaining party had made no request at the time for a clearer statement of the views of the court, when the ambiguity was not of a character calculated to mislead the jury, and was understood by the appellate court.

Importers cannot commingle lawful and unlawful importations in the same invoice, so that they cannot be distinguished, and be allowed to save any portion of the goods from forfeiture.

Refusal by the court to grant instructions as prayed is not error, unless the instructions requested were themselves correct, and needful to enable the jury rightly to perform their duty.

The clerk's minutes contained the statement that the claimant excepted to certain rulings of the court, and that the bill of exceptions was sealed and placed on file, but in fact none such was ever allowed; but the claimant insisted that the rulings were open to comment by him, because apparent on the record. *Held*, that the statement in the minutes was of no avail to the claimant in the appellate court, unless the exception was seasonably reduced to writing and embodied in a regular bill of exceptions.

The concluding paragraph of exceptions was, that "the court would set their seal to the bill of exceptions containing the several matters proved and given in evidence, add the rulings, rejections, and directions of the judge." No particular ruling, direction, or rejection was specified. *Held*, that mere objections to evidence are of no avail in an appellate court, unless it appears that the party excepted at the time. Exceptions must be taken at the time; but if seasonably taken and reserved, they may be drawn out afterward.

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It cannot avail the excepting party in the appellate court where the record stated that he excepted to a certain deposition, leaving it to be inferred that he objected to its admissibility, but stating no ground of objection, and the caption of the deposition not being in the case.

Where special objections are taken to certain parts of the testimony of a deponent, but none to the ruling of the court, they were overruled.

Exceptions to the admissibility of certain evidence to contradict a witness, when no foundation for the contradiction had been laid, are of no avail in the appellate court, the record not stating that the complaining party excepted at the time to the ruling of the court below in admitting the testimony.

THIS was a libel of information, and the case came before the court on a writ of error to the District Court of the United States for this district. The libel contained six counts, the substance of which was, that certain goods, wares, and merchandise were on the 1st of May, 1864, imported from the port of Quebec in Canada into the port of Island Pond in the State of Vermont, and that the agent of the owner on the 7th of May in the same year, at the custom-house in the latter port, did knowingly make an entry of the same by means of an invoice which did not contain a true statement of all the particulars in that behalf required by the act of Congress approved March 3, 1863, entitled "An act to prevent and punish frauds upon the revenue, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes." Seizure was made on land, at Portland, on the 11th of July, 1864; and on the 27th of the same month the plaintiff in error appeared and made oath that he was the sole owner of the goods described in the information, pleading at the same time two pleas in answer to the entire charge, namely: first, that the goods did not, nor did any part thereof, become forfeited in the manner and form as in the information was alleged; second, that if the invoice did not in all respects conform to the requirements of the act of Congress, such omissions arose from inadvertence, error, and mistake, and not from any design to defraud the United States or to evade the payment of the legal duties.

Issue was joined, and on the 19th of January, 1865, the jury returned their verdict that the goods were forfeited as alleged in the libel. Accordingly, on the 1st of March of the same year, judgment of forfeiture was entered, and the claimant sued out

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the writ of error. Exceptions were also filed by the claimant, to the refusal of the court to instruct the jury as requested; and to several instructions which were given to the jury.

George F. Talbot, United States District Attorney.

E. & F. Fox and *Milton Andros*, for defendant.

CLIFFORD, J. Before proceeding to consider the questions presented in the exceptions, it becomes necessary to advert to certain provisions in the act of Congress upon the subject, and to the facts of the case, in order that the real nature of the controversy may be understood.

Invoices of goods imported from any foreign country into the United States are required to be made in triplicate, and if the goods were actually purchased the invoices must be signed by the person owning or shipping the same; or if the goods were procured otherwise than by purchase, the invoices must be signed by the manufacturer or owner of the goods. Such invoices are also required, at or before the shipment of the goods, to be produced to our consul, vice-consul, or commercial agent, nearest the place of shipment, and shall have indorsed thereon, when so produced, a declaration signed by the purchaser, manufacturer, owner, or agent, setting forth that the invoice is in all respects true; and if the goods are subject to *ad valorem* duty and were obtained by purchase, that the invoice contains a true and full statement of the time when, and the place where, the same were purchased, and the actual cost thereof, and of all charges thereon. They are also required to contain certain statements as to discounts, bounties, drawbacks, and the currency paid by the purchaser; and when the goods were obtained in any other manner than by purchase, the actual market value thereof at the time and place when and where the same were procured or manufactured, and if subject to specific duty, the actual quantity thereof, and that no different invoice of the goods has been or will be furnished to any one. 12 Stat. at Large, 737. The requirement also is, that the person producing the invoice shall at the same time declare to the officer the port at which it is intended to make entry of the goods. All these particulars appearing, as required in the section, it is then made the duty of the consul,

vice-consul, or commercial agent, as the case may be, to indorse upon each of the triplicate invoices a certificate under his hand and official seal, stating that the invoice has been produced to him, with the date when produced, and the name of the person producing it, and the port at which it shall be declared to be the intention to make the entry. The same section contains a penal clause which provides that if any such owner, consignee, or agent of any such goods, shall knowingly make, or attempt to make, an entry thereof by means of any false invoice or false certificate of any such officer, or of any invoice which shall not contain a true statement of all the particulars so required, or by means of any false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, the goods or their value shall be forfeited. 12 Stat. at Large, 738.

More difficulty is encountered in stating the facts of the case, as the whole evidence, apparently, in the order it was introduced at the trial, is incorporated into the bill of exceptions. Such a practice is attended with serious inconvenience, and certainly finds no support either in the decisions of the Supreme Court, or in the standard treatises upon the subject. Only so much of the evidence given at the trial as may be necessary to present the legal questions raised and noted, should be embodied in the bill of exceptions in any case. All beyond that serves only to encumber the record and embarrass both court and counsel, as no fact tried by a jury can be otherwise re-examined in any court of the United States, than according to the rules of the common law. *Teller's Lessee v. Eckert et al.*, 4 How. 297; *Johnston v. Jones et al.*, 1 Black, 220; *Pennock et al. v. Dialogue*, 2 Pet. 15; 2 Tidd's Pr. 662; *United States v. King et al.*, 7 How. 845. Cases may be imagined, where the embarrassment arising from conflicting testimony would be so great, that it would become the duty of the court to decline to re-examine the case, and to dismiss the writ of error. The present case, however, is not of that character, as there is not much conflict in that portion of the testimony which it will be necessary to consider, in determining the legal questions involved in the record. Goods, of the description mentioned in the information, filling fifteen merchandise cars, were imported

by the claimant from Quebec into the United States, between the 22d of April, 1864, and the 3d of May following, and the evidence tends to show that all of the cars, except one, with the goods on board, arrived at Island Pond, in the State of Vermont, in the month of April of that year. The first car left Point Levy, opposite Quebec, on the 22d of April, and the last one on the 2d of May, and arrived at Island Pond on the next day. Much the larger portion of the importation consisted of chain cables, bar iron, scrap iron, and hoop iron; but the evidence shows that an invoice was presented to the American consul at Quebec, on the 23d of April of that year, wherein all the iron was described as "old chains and iron," and that it was therein rated at a uniform cost of \$30 per ton. Being duly executed, and containing the proper declaration under oath, the consul granted the required certificates. The testimony also showed that the bar iron was stowed under the chains and scrap iron, and that the agent of the owner claimed that the whole should be admitted to entry as old scrap iron. Such claim was made after the cars arrived at Island Pond; but finding that the goods, or some of them, had been examined by the officers of the customs, he delayed making the entry, and that invoice was never presented. Sufficient goods to load one car had not come forward, and he prepared a new invoice, describing the iron as "bar iron, scrap iron, and old chains," increasing the quantity from eighty-eight to one hundred and twenty-five tons, but without any change as to the cost. Acting under representations that the goods had not been forwarded, the consul was induced, on the 2d of May of the same year, to cancel the first invoice, and to append the required certificates to the substitute. All of the goods were then at Island Pond, except one car-load, which remained at Point Levy, and went forward on that day. The agent of the owner knew that all the goods, except the one car-load, had arrived at the port of entry, because the conductor or person in charge of the cars at Island Pond had, at his request, opened some or all of them, and allowed him to examine the goods. The last car arrived on the 3d of May, and the agent of the owner, four days afterwards, made the entry in the custom-house at Island Pond,

using the substituted invoice prepared by the owner or his agent, and certified by the consul after all the goods, except one car-load, had been imported into the United States, and had actually arrived at the port of entry. Enough of the testimony is presented in this statement, to exhibit the nature of the controversy, and to enable the court to test the accuracy of the instructions given by the presiding justice, and to determine whether there is any merit in the exceptions under consideration. Introductory to the instructions, the presiding justice told the jury that every shipment of goods from a foreign country, under the laws of the United States, should be accompanied by an invoice, and that, under the present law, such invoice must be made and certified by the consul of the United States, at or before the time of shipment. Having made that preliminary observation, he proceeded to instruct the jury in substance and effect as follows: —

1. That where the transportation is upon a railroad, the goods laden in every train of one or more cars, leaving the foreign port at the same time, must be considered a distinct shipment, and that the invoice required by the act of Congress, must be presented by the importer at the time of the entry of such goods.

2. That if the jury found that the invoice by which the goods were entered, was made and certified after the arrival in the United States of all the cars, except one, then they were instructed that the invoice in the case was not the invoice authorized by law, and that no legal entry could be made by it; and that if the goods were entered by means of such an unlawful invoice, they were liable to forfeiture to the United States, if the entry was knowingly made by the use of such unlawful invoice.

3. That if any part of the goods arrived in the United States after the date of the invoice and declaration, and the invoice by which those goods were entered contained other goods belonging to previous shipments, and not distinguished from such other goods, then the invoice of such shipment was a false invoice, and subjected the goods, upon entry being made thereof, to forfeiture.

Undoubtedly the instructions are very inartificially drawn, but the foregoing statement, it is believed, expresses their substance and effect. Some of the forms of expression are ambiguous, but

the instructions of the court must always receive a reasonable construction, and when so construed, it is not perceived that there is any such want of clearness as would mislead the jury. Courts are not inclined to grant a new trial merely on account of an ambiguity in the charge to the jury, where it appears that the complaining party made no effort at the trial to have the point explained. *Castle et al. v. Bullard*, 23 How. 189. If the claimant supposed that there was any danger that the jury would be misled, he might well have asked that further and more definite instructions should be given; and if he had done so, and the prayer had been refused, this objection would be entitled to more weight. The correctness of the preliminary observations of the court, as applied to maritime shipments, cannot be doubted, and it is equally accurate as applied to shipments by a railroad, in a foreign country, when considered in connection with the subsequent instructions. Merchants often purchase goods at one adventure, sufficient in quantity to load several vessels, but it is clear beyond doubt, that an invoice executed in triplicate in due form, as required, must be produced at or before each shipment, to the consul, and when so produced, must have indorsed thereon the required declaration. Those requirements attach to each shipment, and it is obvious that if it were not so, the revenue regulations might as well be repealed, as the contrary rule would open the door to every species of evasion and fraud. The same reasons require that the same rule should be applied to each train of one or more cars, laden with dutiable goods, purchased or otherwise acquired in a foreign country, and designed for importation under our revenue laws. Such shipments are subject to the same laws as importations in ships, and they must be governed by the same rules of construction.

Granting that to be so, then it is clear that the first instruction was correct, as the express words of the act of Congress require, that an invoice in triplicate shall be produced to the consul at or before the shipment. The object of the provision was doubtless to afford protection to the revenue, but it is obvious that it would afford none, unless it be required that one copy of the invoice shall be presented to the consul at or before the entry. Adopt

the construction that the shipper may forward his goods and procure his invoice afterwards, and the acts of Congress and the regulations of the Treasury Department are of no avail. Argument, however, upon the point is unnecessary, as the language of the provision in the act of Congress sustains the instruction in express words.

The closing paragraph of the second instruction is also the subject of complaint, but the criticisms, as the language is understood by the court, are without merit, and the objection must be overruled on that ground; and also for the reason that, it was the duty of the claimant, if he thought the language was ambiguous, to have requested a clearer statement of the views of the judge. The plain inference from the language reported is, that the judge intended to repeat the words of the provision on which the information is founded, and it is not doubted that it must have been so understood by the jury.

Objection is also taken to the third instruction, because it admits that the jury might find that the goods brought forward on the last car, which were accompanied by the substituted invoice, were forfeited, in case they found that the goods previously transported in the fourteen cars without any invoice, and before the substituted invoice was made, were contained in the same invoice, and in a manner that could not be distinguished. The theory of the United States is, that fourteen cars had been sent forward without any invoice, with the intention of defrauding the revenue, but that the agent, when he found the goods had been examined, apprehending difficulty, returned and procured the substituted invoice, and the evidence tends to sustain that view of the transaction.

Irrespective, however, of the evidence, I am of the opinion that the instruction is quite correct. Importers cannot commingle unlawful and lawful importations in the same invoice, so that they cannot be distinguished, and then be allowed to save any portion of the goods from forfeiture, because such an invoice is false, and subjects the goods to the consequences attaching to a false invoice.

Due exceptions were also taken to the refusal of the court to

instruct the jury as requested by the claimant. He presented fifteen prayers for instructions, as appears in the transcript, and they were all refused by the court. Refusal to grant instructions as prayed is not error, unless the instruction itself was correct, and needful to enable the jury rightly to perform their duty. Some of the prayers for instructions were plainly correct as abstract propositions of law, but I am of the opinion that the instructions given by the court, were amply sufficient to enable the jury to determine the whole controversy. The substantial charge in all the counts, except one, was, that the entry was knowingly made by means of a false invoice, and that question was fully and clearly submitted to the jury in the charge of the court. The whole controversy turned upon that question, as involved in five out of the six counts. Where the instructions given by the court cover the whole controversy, and are sufficiently full to enable the jury to decide the entire issue between the parties, the refusal of the court to give other instructions is not error. Prayers for instruction applicable to the fourth count were presented and refused. But the objection to the rulings in that behalf were not much pressed at the trial, and if they had been they could not be sustained.

After verdict and before judgment, the claimant submitted a motion in arrest of judgment. The foundation of the motion as alleged, is certain defects in the information, which are presented in thirty-one points. The bill of exceptions was filed on the 19th of January, 1865, and the statement in the minutes is, that the motion in arrest was overruled on the 31st of March following. The clerk's minutes also state that the claimant excepted to the ruling of the court, and that the bill of exceptions was sealed and placed on file; but both parties agree that no such bill of exceptions was ever allowed. Repeated decisions of the Supreme Court have established the rule, that such a statement in the minutes is of no benefit to a party, unless he seasonably avails himself of the right to reduce the exceptions to writing, and procures it to be sealed by the judge presiding at the trial. *Pomeroy's Lessee v. Bank of Indiana*, 1 Wall. S. C. 598; *Thompson v. Riggs*, 5 Wall. S. C. 663. Conceding that there is no exception

in this case, still the claimant insists that the point is open to him, because he claims that the ruling of the judge is apparent in the record, and refers to certain well-known cases which affirm the rule, that errors apparent in the record may be commented on without any bill of exceptions. But the error of the proposition consists in the fact that the ruling of the court is not apparent in the record. He insists that it is so, because it is so stated in the minutes; but the cases already referred to decide that such a statement in the minutes is of no avail in the appellate court, unless the same is seasonably reduced to writing, and incorporated into a regular bill of exceptions. Recurring to the record, it will be seen that objections to the admissibility of evidence, were repeatedly made by the claimant during the trial, which objections were overruled by the court, and in his printed argument he proceeds upon the ground that the rulings of the court in that behalf, are included in the excepting clause of the bill of exceptions.

The statement in the paragraph immediately following the instructions of the court is, that the claimant did then and there except to the aforesaid rulings and instructions of the court, as well as to the refusal of the court to give the instructions, as prayed for by the claimant. The better opinion is, that the reference in that paragraph is only to the rulings of the court in giving the instructions, and to the refusal of the court to grant the claimant's prayer for instructions. The request of the claimant, as stated in the concluding paragraph of the exceptions, is, that the court will set their seal to the bill of exceptions containing the several matters proved and given in evidence, and "the rulings, rejections, and directions of the judge." No particular ruling, rejection, or direction is specified, and there is nothing in the record by which the precise meaning of the excepting party can be ascertained. Mere objections to evidence are of no avail in an appellate court, unless it appears that the party excepted at the time. Exceptions must be taken at the time, but if seasonably taken and reserved, they may be drawn out afterward. *Dredge v. Forsyth*, 2 Black, 568; *United States v. Breitling*, 20 How. 254; *Phelps v. Mayer*, 15 How. 160. Exception was

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taken by claimant during the trial, to the ruling of the court allowing a certain question to be put to the witness S. B. Locke, but the objection was not insisted on at the argument. The record also states in effect, that the claimant objected to the deposition of John S. Bowen, when offered by the district attorney, and the inference from the record is, that the claimant excepted to its admissibility, but upon what ground does not appear, and the caption of the deposition is not in the case. Special objection was also made to certain parts of the deponent's testimony which were admitted by the court, but no exceptions were taken to the ruling of the court. Complaint is also made of the ruling of the court in excluding certain parts of the deposition of James Reid; and the statement in the record is, that the claimant then and there excepted to the ruling of the court. The testimony rejected was offered to show that Reid, who, on the 2d of May, 1864, had sworn that the invoice was true, and that he was the owner of the goods, had previously sold them to the claimant. Strong doubts are entertained whether the testimony was material, but if so, it was properly rejected. *Alfonso v. United States*, 2 Story, 430. The claimant also complains that the witness Charles S. Ogden was permitted to testify that Reid had assigned to him reasons for procuring the substituted invoice, different from those assigned in his testimony, when no foundation had been laid to admit any such contradiction. But the record fails to state that the claimant excepted to the ruling of the court. The best conclusion I can form, in view of the whole case is, that there is no error in the record.

Judgment affirmed.

DAVID WELD v. CLARISSA W. MADDEN.

A deed of certain real estate in Maine was executed in 1836, G. B. to F., but not recorded till 1858. At the execution of the deed, R. was in the occupation of the premises conveyed, and remained there, boarding with F., until the next summer, when he left and never returned. F. and his grantees always continued in open, notorious, and exclusive possession of the premises, making valuable improvements thereon. W. on the 8th of

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October, 1853, attached the premises, and on the 24th of November, 1857, levied on them as the estate of B. *Held*, that these facts constituted implied notice to W. of B.'s deed to F., although the same was not recorded until after the levy.

The description of the premises in the deed B. to F., was as follows : " A certain lot, piece, or parcel of land in said Cherryfield, and on the west side of the Narragausus River, and being all the lot of land which said Burbank purchased of one Joseph Chamberlain, except that part of said lot which said Burbank has heretofore sold and conveyed to said Freeman by deed, together with all the buildings, privileges, and appurtenances thereto belonging," there being no evidence of any prior deed from B. to F. it was *held*, that the title to the whole lot passed by the conveyance.

WRIT of entry dated April 6, 1860, plea *nul disseisin*. The demandant attached the premises by due process as the property of Caleb Burbank, on the 8th of October, 1853. Judgment for the plaintiff was rendered October 24, 1857, and he levied his execution on the premises on the 24th of November, same year. Burbank acquired title by deed of warranty from one Joseph Chamberlain, dated November 7, 1835, duly acknowledged and recorded. Having introduced the levy, and proved that the land therein described was a part of the Chamberlain lot, the demandant rested his case.

The tenant set up title in her former husband, Stephen O. Madden, deceased, and to support the issue upon her part introduced the following conveyances : —

Deed: Caleb Burbank to William Freeman, dated August 18, 1836, and acknowledged on the same day, but not recorded till April 29, 1858, after the date of the levy. Deed: William Freeman to Stephen O. Madden, dated April 26, 1849, acknowledged on the same day, and recorded on the following day. Deed: Same to same, dated June 18, 1849, acknowledged same day, and recorded on the 1st of July, the following year. It was agreed that the tenant held the title of her deceased husband, and that the controversy should turn upon the construction and effect of the deed Caleb Burbank to William Freeman, prior in date to the attachment and levy, but in date of record subsequent to the attachment.

The tenant claimed that demandant had implied notice of the existence of the deed, and the evidence showed that the grantee under this deed went into possession in September or October next after the date of its execution, and that he remained

upon the premises making valuable improvements, until he conveyed the property to Stephen O. Madden. One Tristram Redman was in possession of the premises under the grantor, at the date of the conveyance, and he remained in the house boarding with the grantee until the next summer, when he left, and never returned.

The description of the premises in the deed Burbank to Freeman was as follows : —

“ A certain lot, piece, or parcel of land in said Cherryfield, and on the west side of the Narragausus River, and being all the lot of land which said Burbank purchased of Joseph Chamberlain, except that part of said lot which said Burbank has heretofore sold and conveyed to said Freeman by deed, together with all the buildings, privileges, and appurtenances thereunto belonging.”

The demandant insisted that the defence failed, because the deed Burbank to Freeman, under which the tenant claimed, was not recorded before the levy was made ; but the court being of opinion that the question of implied notice should be submitted to the jury, the demandant offered to prove, as rebutting evidence, the contents of the deed referred to, in the recital of the deed Burbank to Freeman, which had previously been introduced by the tenant without objection. No notice to produce the deed had been given, and there was no other evidence that any such deed was ever actually executed than what appeared in the recital. Under those circumstances the court ruled that parol evidence of the contents of the deed was inadmissible, and no exceptions were taken to the ruling.

The substance of the instructions upon the question of implied notice were, that open and visible possession of improved real estate by the grantee of an unrecorded deed was at the date of this transaction implied notice to a subsequent purchaser of the same land ; that if the jury found that Freeman entered into the open and visible possession of the premises in October next after the date of his deed, and that he and those claiming under him continued in such possession, making valuable improvements thereon, to the date of the demandant's attachment, then they were instructed that these facts constituted implied notice

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to the demandant of the deed of Freeman, although they might find that Redman was at the time in possession under the grantor, and continued to reside there till the following summer, provided they also found that Redman then ceased to live there, and that the possession of Freeman thereafter was open, notorious, and exclusive. Demandant moved for new trial.

P. Thatcher for demandant.

Howard and *Cleaves* for tenant.

CLIFFORD, J. The demandant does not controvert the correctness of the first instruction, nor can he with any hope of success, as such undoubtedly was the law at the date of this transaction. Conceding that, he nevertheless insists that the second instruction is erroneous, because it admits that the person in possession under the grantor at the date of the deed Burbank to Freeman remained for some months in the house with the grantee. His theory is that the change of possession must be immediate and complete in order to constitute the basis of the presumption of notice, but he refers to no decided case which gives any support to that theory. Redman was in possession of the premises at the date of the deed, but whether as tenant at will, or otherwise, does not appear. He claimed no title, and at once became a boarder in the family of the grantee. During the next summer he left the premises; and the grantee and those claiming under him have been in the open, notorious, and exclusive possession of the premises ever since, and for a period of more than sixteen years, when the attachment was made. Numerous authorities might be referred to in support of the ruling of the court, but it seems to be unnecessary, as they are all one way. The matters of fact assumed in the instruction have been found by the jury in favor of the tenant, and therefore in determining the legal questions they must be regarded as true. Such being the rule of law, it follows, as a necessary consequence, that if the instruction was correct, the demandant had implied notice of the deed under consideration.

The second exception impliedly concedes that the deed in question was duly executed, and that the demandant had due notice of its existence at the date of his attachment, but denies

that the description in the deed is sufficient to convey to the tenant a good title to the premises. Evidently the question here presented is entirely separate and distinct from the one just decided. They should be separately examined, and must be separately decided, as nothing but confusion of ideas can result from considering them together. Prior title is in the tenant if the description in the deed Burbank to Freeman is sufficient to convey the land. Beyond doubt Burbank was the lawful owner of the whole of the Joseph Chamberlain lot, and it is equally clear that he conveyed to Freeman, by the deed of the 18th of August, 1836, all of the lot which he thus acquired, except what he had before conveyed by deed to the same grantee. The argument of the demandant is, that the recital negatives the theory that the tenant held and owned the whole lot, but the proposition as between the parties is refuted by the express words of the deed. The grantor did not intend to convey the land twice, but he evidently meant to convey the whole lot, and could not be heard to aver the contrary. All that he intended by the recital was to exclude the conclusion of a double conveyance of the same land, that is, he intended to convey the whole lot, unless he had previously conveyed a part of it to the same grantee. The inference perhaps is, that he had previously conveyed a part of the lot to the grantee, but the recital contained no such definite statement, nor are there any words by which either the deed or the land supposed to be reserved can be identified. Granting that the deed was a good and sufficient conveyance as between the parties, then it follows that the demandant cannot call the title in question, because he is a subsequent purchaser, with implied notice of the prior deed. His title under the finding of the jury is no better than it would be if the deed Burbank to Freeman had been recorded at its date, and if it had been it is very clear that the levy would be of no avail. Implied notice of a valid prior deed defeats the title of a subsequent purchaser, and it must be held to have the same effect upon a subsequent attachment of the same land. Much of the error in the argument for the demandant arises from commingling the two questions together. Unless the demandant had implied notice of the deed

Burbank to Freeman, he must prevail ; but if he had such notice, then he has no title whatever, if the deed between those parties was a sufficient and valid conveyance. The verdict of the jury shows that he had such notice, and it has already been shown that, as between the parties, a good title was conveyed to the grantee. The effect of the recital is to bind the grantor as well as the grantee, so that in no event could the former be heard to claim anything in the land described. Assume that the inference is that the grantor had previously executed a deed of a part of the lot to the grantee, still it is obvious that the recital of that fact could not lessen or impair the title of the grantee, as between the parties and the demandant, as a subsequent purchaser with notice is in no better condition. But estoppels must be certain to every intent, and I am of the opinion that the language of the recital is too indefinite to sustain the views of the demandant. Besides, he claims nothing under the recital, and consequently is in no condition to make the objection which is the foundation of his motion. Throughout the argument he fails to show in what manner he would be benefited by a new trial, if the instructions of the court as to implied notice are correct. He does not even suggest that the whole lot was not conveyed to Freeman prior to the attachment. All he pretends is, that a part of it was conveyed before the date of the deed given in evidence ; but it is difficult to see how that fact, if shown, could operate to his advantage, and he gives no explanations upon the subject.

Special reference is also made by the demandant to the other instructions of the court, but it is unnecessary to examine those suggestions, as no such exceptions were taken at the trial, and no such objections are embraced in the motion.

Being of the opinion that the finding of the jury is fully sustained by the evidence, the motion for new trial is overruled.

Judgment on the verdict.

MASSACHUSETTS DISTRICT.

MAY TERM, 1867.

CHARLES BURRILL v. THE CITY OF BOSTON.

Towns in Massachusetts have no power in their corporate capacity to raise money to provide for the public defence, to pay bounties to enlisted or drafted men, unless by express delegation of such power to them by and from the legislature of the State.

Acts of the legislature of Massachusetts, authorizing towns to raise money to procure their quotas of volunteers in the late war of the Rebellion, did not empower them to assess and collect taxes to defray the expenses of obtaining credits upon their quotas, of residents previously enlisted but not enrolled and accredited to such towns.

The mayor of a city in Massachusetts made a contract with a certain person to pay him a certain sum per man for every credit upon the volunteer quota of the city which he could obtain from those residents enlisted into the service of the United States prior to May 31, 1864, and not credited to the city. *Held*, that the mayor, as agent of the city council, if acting with their assent, had power to bind the corporation to the fulfilment of the contract, provided the corporation had power under their charter and the acts of the State legislature to enter into it, but that the act of the State legislature of March 18, 1864, and a subsequent act, limited the appropriation of the money raised by a city under them, to the purpose of obtaining its proportion of volunteers in the United States military service, under certain orders of the President in said acts specified, and that they did not delegate an authority to raise money to pay the expense of having previously enlisted men credited upon such city's quota.

Held, therefore, that the plaintiff was not entitled to maintain an action against the city upon such contract, inasmuch as the corporation had no authority to incur such an obligation.

THIS was an action of assumpsit upon the following contract, made between the plaintiff and F. W. Lincoln, Jr., as mayor of the city of Boston : —

“In consideration that Charles Burrill, of Brookline, Mass., shall obtain credits upon the quota of the city of Boston, I hereby agree to pay to the said Charles Burrill the sum of one hundred and twenty-five dollars per man, for each and every full man so credited upon said quota, the money to be paid to the said Burrill whenever he presents to me the official certificate

from the proper authority, showing that such credits have been given.

“ F. W. LINCOLN, JR., Mayor.

... “ May 31, 1864.”

The credits referred to were of such residents of the city of Boston as had enlisted into the service of the United States during the late Rebellion, but had not been enrolled and credited to the quota of the city prior to February 24, 1864. The plaintiff was to obtain these credits under the provision of § 8 of the act of July 4, 1864. Plaintiff claimed to have obtained credits for six thousand five hundred and twenty-nine men.

At the close of the plaintiff's case, the defendants moved the court for instructions that the plaintiff had not made out his case, and was not entitled to maintain his action.

B. F. Butler, Henry W. Paine, Benjamin Deane, William Gaston, for plaintiff.

B. R. Curtis, J. G. Abbott, J. P. Healey, for defendants.

CLIFFORD, J. When the plaintiff's case is closed it is competent for the defendant to present such a prayer for instruction, and he has a right to have the matter determined by the court. Such is the settled practice of the court, and experience has confirmed its justice and convenience. The theory of the motion is, that the plaintiff is not entitled to recover in any view of the evidence, and it is never granted unless such is the opinion of the court. Plaintiff is required to introduce the whole of his evidence in support of his declaration before the defendant is required to state his defence, and if the plaintiff is not entitled to recover in any view of his evidence, it is useless to proceed further in the case. Questions of law must be determined by the court, and as a general rule they can be as understandingly determined at that stage of the trial as at any later period. The present request is founded upon certain objections to the right of the plaintiff to maintain the suit, which it is supposed cannot be overcome. Reference will first be made to the objections taken to the right to maintain the suit upon the special counts. They are all drawn upon the written contract signed by the mayor, and which reads as follows: —

Burrill v. City of Boston.

[Here the court recited the above agreement.]

The substance of the declaration is, that the defendants by that writing did promise, undertake, and agree to and with the plaintiff, that if he, the plaintiff, would obtain credits upon the quota of the city, they would pay him \$125 for each and every full man so credited upon said quota whenever he should present to the mayor official certificates that such credits had been given. The plaintiff also alleges that on the 5th of September, 1864, he obtained credits on the said quota of six thousand five hundred and twenty-nine full men, and that he did on the same day present the required certificates to the mayor. He accordingly claims the sum specified in the declaration, and alleges that the defendants have refused to pay as they promised. The first objection made by the defendants is, that the promise in the writing declared on, having been made by the mayor, the action cannot be maintained against the defendant corporation; but we are not able to concur in that view of the law. On the contrary, we hold that the action is well brought, if the mayor, in executing the instrument, acted as the agent of the city council, and the defendants had power under their charter or the laws of the State to enter into the contract. *Ford v. Williams*, 21 How. 287; *Higgins v. Senior*, 8 M. & W. 834; 1 Parsons on Con. (5th ed.) 52. It is obvious that the mayor could not make such a contract in behalf of the city without the assent of the city council; and it is equally clear that the assent of the city council, if given, would be without any legal efficacy, unless the corporation possessed the power to contract such a pecuniary obligation. The great question, therefore, is the question of power, and it is the one first to be considered, because if it be determined against the plaintiff it is unnecessary to inquire whether the mayor did or did not act by the assent of the city council. The argument for the plaintiff is that the city council, even if they did not previously assent to the contract; subsequently ratified the act of the mayor in executing it; but, if the corporation possessed no power to incur such a pecuniary obligation, the city council could not effectually ratify it. The Supreme Court of the State decided half a century ago that towns

were restricted in their powers of raising money and causing it to be assessed and collected "to the cases of providing for the poor, for schools, for the support of public worship, and other necessary charges"; that they had no lawful right and authority in their corporate capacity to raise money and cause it to be assessed upon the polls and estates within the town for the purpose of paying additional wages to drafted or enlisted men, or for any other expenditure for defence. The correctness of that decision is not now questioned, and it could not well be, as it has been sanctioned by a series of subsequent decisions coming down to the present time. They were cited at the argument, and need not be reproduced, as, when properly understood, they are all to the same effect. The express decision in the leading case is, that it is not the corporate duty of the town to provide for defence in time of war, because that obligation is devolved upon the government, State or National. Twenty years later the same court held that that test was a decisive one against all grants of money liable to that objection. *Allen v. Inhabitants of Taunton*, 19 Pick. 485. The same rule prevails in Maine, New Hampshire, and Connecticut, as appears by decisions of very recent date. The settled rule in all the States referred to is, that it is no part of the corporate duty of towns, as such, to provide for public defence or to raise money to pay bounties or additional wages to volunteers or drafted men, and that they have no authority so to do unless by an express delegation of power to them for that purpose from the legislature. *Barker v. Dixmont*, 53 Me. 576; *Alley v. Edgcomb*, 53 Me. 446. These decisions go further, and decide that the adoption of town boundaries as convenient limits of the sub-districts in raising the quota of the State, imposed no new duties upon the municipal corporations which were created for other special purposes. Repeated decisions of the Supreme Court of the United States have also laid down the rule that municipal corporations derive all their powers from the source of their creation, which is the legislature. Undoubtedly the legislature may authorize towns to raise money and apply it for such purposes, and it may be that subsequent legislation can ratify and confirm the

doings of towns in incurring such expenses not previously authorized by law. These remarks make it unnecessary to refer to the provisions of the charter of the defendants, as it is perfectly clear that there is nothing in those provisions to take the case out of the general rule established by the decisions of the State court. Special reference is made by the plaintiff to two acts of the State legislature, as conferring the power to make the contract described in the declaration. Before examining those enactments, however, it will be useful to ascertain more definitely the true construction of the contract. Credits upon quotas are required, and not volunteers or recruits, as is obvious throughout the contract. The plaintiff does not bind himself to procure one "credit" or one volunteer or recruit, but the mayor promises to pay \$125 per man for each and every full man credited upon the quota of the city, if obtained by the plaintiff. No time is fixed for its fulfilment. In terms it is not a contract for a year, nor for three years, nor during the war, but if it be held to extend beyond the then impending draft, is indefinite as to time of fulfilment, number to be obtained, and duration. Applied to the subject-matter, it is not doubted that the word "credit" would include recruits or enlistments, but the contract could afford no assurance that the deficiencies in the several wards would be supplied from that source. The second section of the act of Congress of the 24th of February, 1864, required that the number of men who had before entered the naval service, and whose names were borne on the enrolment list already returned to the provost marshal, should be taken into account in ascertaining and filling the quotas described in the first sections of the act. But there was no provision in any act of Congress, at the date of the contract, authorizing any such credits on quotas as were subsequently obtained by the plaintiff in this case.

The eighth section of the act of the 4th of July, 1864, provided:—

"And be it further enacted, that all persons in the naval service of the United States who have entered said service during the present Rebellion, who have not been credited to the quota of

any town, district, ward, or State, by reason of their being in said service, and not enrolled prior to February 24, 1864, shall be enrolled and credited to the quotas of the town, ward, district, or State in which they respectively reside, upon satisfactory proof of their residence made to the Secretary of War."

Satisfactory proof of residence was required by that act to be made to the Secretary of War, and he accordingly referred the list prepared by the plaintiff to the commission mentioned in the evidence, as a means of complying with that provision. Recruits might have been obtained at any time after the date of the contract, but the plaintiff did not obtain any, and it is clear the contract did not require anything but credits. Suffice has been remarked to show the general characteristics of the contract, and to prepare the way for the inquiry, whether either of the acts of the legislature referred to afford any support to the theory that the contract was one which it was competent for the defendants to make or ratify. Money raised by a city under the act of the 18th of March, 1864, was required to be applied, under the direction of the mayor and aldermen or city council, in aid of, and for the purpose of procuring its proportion of the quota of volunteers in the military service called for from the Commonwealth, under certain orders of the President therein specified. Certain quotas of volunteers in the military service had been called for from the Commonwealth, and the purpose of the act was to authorize any town or city to raise money to procure their proportion of said quotas of volunteers. Doubt cannot be entertained upon that subject, but if it could be, it must certainly be removed by reading the proviso, which limits the amount authorized to be raised to \$125 for each volunteer enlisted in said service after the passage of the act. Sup. to Gen. Stats. p. 253. The second act of the legislature of the State referred to is to the same effect, except that it extends the authority to any order or call of the President issued after March 1, 1864, and before March 1, 1865, but the declared purpose of the act is the same, and the limitation is the same as in the prior act. The plain purpose of both acts was to procure volunteers, and not to obtain credits, as prescribed in the contract. Suffice

it to say, without pursuing the argument, that those provisions, in our opinion, afford no support to the theory of the plaintiff. Our conclusion is that the defendants had no power to make the contract mentioned in the declaration; that they possess no power to assess and collect taxes for any such purpose, and consequently that the plaintiff cannot recover upon the special counts. Suppose that to be so, still, it is insisted by the plaintiff that he is entitled to recover a reasonable compensation for his labor and expenses under the common courts. Every suggestion upon that subject was listened to with attention, and has been carefully considered. Willing to be convinced, it was the purpose of the court to invite discussion upon the point, that no argument in support of the proposition might be overlooked. Some of the arguments are very ingenious, but they have failed to convince. Want of power to assess and collect the money to discharge the obligation, is the obstacle in the way of maintaining the suit on the express contract, and the same difficulty stands in the way of an action founded on an implied promise. *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfil that obligation. Such a promise is always charged in the declaration, and must be so charged in order that the action may be maintained. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. *Curtis's Admrs. v. Fiedler*, 2 Black, 478; *Cary v. Curtis*, 3 How. 236. Assumpsit may be maintained against a municipal corporation in certain cases upon an implied promise, but the better opinion is that a promise to pay can never be implied in a case where the corporation possesses no power to contract. Unable to perceive that the plaintiff can recover in any view of the case, it becomes the duty of the court to give the instruction as prayed by the defendants. Verdict must be for the defendants, and the form of the verdict will be prepared accordingly.

ADAM BAILEY *et al.* v. JOHN Z. GOODRICH.

The determination of appraisers under the fifth section of the act of the 5th of March, 1823, as to the true and actual market value and wholesale price of an importation, in the principal markets of the country from which it was exported, is conclusive in the premises.

But these duties of the appraisers are, by the first section of the act of March 3, 1851, limited to goods, wares, and merchandise subject to *ad valorem* duty.

Values of imported goods subject to specific duty are, by section 8 of the act of February 10, 1820, ascertained in the same manner as those of goods subject to *ad valorem* duty, but the requirement is for statistical purposes different from those described in the acts of Congress making provision for the appraisement of articles subject to *ad valorem* duty.

In the appraisement of goods subject to specific duty the decision of the appraisers is not conclusive as in the case of goods subject to *ad valorem* duty.

MOTION for new trial. This was an action of assumpsit brought against the defendant as collector of the port of Boston, to recover the duties paid on two importations of rice from Calcutta, by the plaintiffs, one in December, 1861, by the ship *Dolphin*, and one in March, 1862, by the ship *Fleetwing*. Both importations were invoiced by the plaintiffs as "first quality Patna table rice." The plaintiffs entered the cargo of the *Dolphin* as "uncleaned rice," and dutiable at one half a cent per pound. The appraisers reported it to be "cleaned rice," and dutiable at one cent per pound, and duties were exacted accordingly. The importers protested against the levying of these duties, and appealed to the Secretary of the Treasury, who sustained the decision of the officers of the customs. In the case of the *Fleetwing*, the plaintiffs entered the cargo as rice, one cent per pound. The appraisers reported it as "cleaned rice correct," and duties were accordingly assessed; and the plaintiff protested against the levying of this rate of duty. The court instructed the jury that the finding of the appraisers in the case of the *Dolphin*, that the importation was clean rice, and dutiable at one cent per pound, after appeal, and after confirmation of that finding by the Secretary of the Treasury, was conclusive as to the character of the importation, and that the decision of the collector, based on that finding, after the same was confirmed on appeals by the Secretary

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of the Treasury, fixed the true rate of duty to which the importation was subject. They also instructed the jury in the case of the Fleetwing, that the plaintiff having entered the importation as rice, at one cent per pound, it became the duty of the collector, in the absence of any appeal to the Secretary of the Treasury, to assess the duties on that basis, and that the protest is not sufficient to recover back the duties on the ground that the plaintiffs were required by the collector to make such an entry. The court accordingly directed a verdict for the defendant, subject to the right in the plaintiffs to move for a new trial.

The hearing was had before Judges Clifford and Lowell.

C. L. Woodbury and *S. W. Bates*, for plaintiffs.

W. A. Field, for the defendant.

CLIFFORD, J. The jury in this case, under the instructions of the court, returned their verdict in favor of the defendant, and the plaintiff now moves the court to set the verdict aside and grant a new trial, upon the ground of error in the instructions. The substance of the instructions was, that the finding of the appraisers that the importation was cleaned rice, under the circumstances disclosed in the evidence, was conclusive. The tenth section of the act of 10th of March, 1861, imposed a duty of one cent per pound on cleaned rice, and fifty cents per one hundred pounds on uncleaned rice or paddy. 12 Stat. at Large, 183. Two importations of rice were made by the plaintiffs, one in the Dolphin, and the other in the Fleetwing, and the importations were separately entered at the custom-house. Entry in the first case was "uncleaned rice," and in the second case it was "rice, at one cent per pound."

In both cases the claim of the plaintiff was, that the rice was uncleaned, and consequently that it was subject only to a duty of fifty cents per one hundred pounds. The decision of the appraisers was that it was cleaned rice, and that it was subject to a duty of one cent per pound. Adopting their report, the collector classified the importations as cleaned rice, and assessed the duty accordingly. Plaintiff appealed to the Secretary of the Treasury, and he confirmed the decision of the collector. Whereupon the plaintiff paid the duties under protest, and brought this suit

to recover back the excess beyond the amount properly levied on uncleaned rice. The proposition of the plaintiff is, that the instructions in the case of the Dolphin were erroneous; and that is the only question in the case, as the plaintiff declines to argue the other question.

The appraisement Act of the 1st of March, 1823, in its fifth section prescribed the manner in which *ad valorem* rates of duties on imports should be estimated, and the sixteenth section provided for the appointment of certain appraisers, and required that they should make oath diligently and faithfully to examine and inspect such goods, wares, or merchandise as the collector may direct, and truly to report to the best of their knowledge and belief the true value thereof, according to the provisions of the fifth section of the act. 3 Stat. at Large, 732 – 735.

Collectors of the customs were required by the act of the 28th of May, 1830, to cause one package of every invoice, and one at least out of every twenty packages of each invoice to be opened and examined. . . . And if such goods were subject to *ad valorem* duty the requirement was, that they should be appraised. 4 Stat. at Large, 410. Appraisers were required by the sixteenth section of the act of the 30th of August, 1842, and it was made their duty, by all reasonable ways and means in their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price of goods, wares, or merchandise subject to “any *ad valorem* rate of duty” at the time purchased, and in the principal markets of the country whence the same shall have been imported into the United States. 5 Stat. at Large, 563. Packages to be opened for that purpose and examined and appraised, were to be designated by the collector, and ordered to the public stores.

The precise requirement is, that he shall designate on the invoice one package at least of every invoice, and one package of every ten packages of the goods imported, to be sent to the public stores for examination.

Where it became necessary that the appraisers, in order to ascertain, estimate, and appraise the true and actual market value and wholesale price of the importation, should determine

what were the principal markets of the country from which it was exported, the Supreme Court held that their decision in the premises was conclusive. *Stairs v. Peaselee*, 18 How. 524.

The duties of appraisers are also limited by the first section of the act of the 3d of March, 1851, to the appraising, estimating, and ascertaining the actual market value and wholesale price of goods, wares, and merchandise subject to "*ad valorem* rate of duty." They are to appraise, estimate, and ascertain the actual market value of such importations at the period of the exportation, in the principal markets of the country from which the same shall have been imported, and all charges, except insurance, and a charge for commission at the usual rates, are to be added, and the amount so computed is declared by the act to be the true value of the goods at the port where the same may be entered, upon which the duties shall be assessed. 9 Stat. at Large, 630.

Repeated decisions of the Supreme Court have established the rule that the report of the appraisers made to the collector, in pursuance of their duty to appraise, estimate, and ascertain the actual value or wholesale price of such goods at the period of the exportation, in the principal markets of the country from which the same were imported, is final and conclusive as to such value. *Belcher et al. v. Linn*, 24 How. 522; *Bartlett v. Kane*, 16 How. 272; *Rankin v. Hoyt*, 4 How. 327. Required as the appraisers are to appraise, estimate, and ascertain such value, the Supreme Court has in effect determined that every matter necessarily involved in that inquiry and determination, must also be considered as conclusively decided in the suit to recover back duties assessed on the importation. *Stairs v. Peaselee*, 18 How. 524; *Belcher v. Linn*, 24 How. 523.

All of those decisions, however, were made in respect to importations subject to *ad valorem* duties, and in cases where some act of Congress made it the duty of the appraisers to appraise, estimate, and ascertain the actual market value or wholesale price of the importation at the period of exportation, in the principal markets of the foreign country, as the basis upon which the *ad valorem* duties should be assessed. Importations, subject only to specific duties are not required to be so appraised

and estimated, or the market value to be so ascertained for any such purpose. Values of all imported articles subject to specific duties are required to be ascertained by the eighth section of the act of the 10th of February, 1820, in the manner in which the values of imports subject to duties *ad valorem* are ascertained, but the requirement is for statistical purposes, and not for any such purpose as that described in the acts of Congress making provision for the appraisement of importations subject to *ad valorem* duties.

Our conclusion is that the instructions of the court in respect to the effect of the appraisers' report in the case of the Dolphin were erroneous, and the verdict must be set aside and a new trial granted.

OCTOBER TERM, 1867.

THE UNITED STATES v. THE WASHINGTON MILLS.

The defendants were manufacturers of woollen goods. They bought wool, spun it into yarn, and then wove the yarn into fabrics for clothing. This yarn was not known in the market as an article of trade, as manufacturers of the particular fabrics spun it themselves. An internal-revenue tax of five per cent upon the full value of the manufactured fabrics had been assessed and paid; and subsequently a reassessment of five per cent on the value of the yarn, from which the fabrics were manufactured, had been made, and assumpsit was brought to recover the same. Assessment was made under the act of June 30, 1864, and before the passage of the act of March 3, 1865. *Held*, that the yarn was a separate and independent manufacture, and was properly subject to the assessment of five per cent.

THIS was an action of assumpsit for the recovery of \$ 276.95 alleged to be due from the defendants, as taxes on manufactures under the Internal-Revenue Act of June 30, 1864, and the case was submitted upon an agreed statement of fact. The defendants were the manufacturers of woollen goods. They bought wool, spun it into yarn, dye or bleach the yarn, and then weave it into fabrics, such as shawls and webs for Balmoral skirts.

Webs for shawls were manufactured of the proper width for shawls, and were intended for that use, and were not fit for or used for any other purposes. They were woven in patterns with fringes made in the weaving, and which were twisted by machinery. When the web was woven and the shawls cut apart they were ready for wear, and in that condition they were sold by the defendants, and worn by men, women, and children.

Yarn such as that from which these shawls and skirts were made was not known in the market as an article of trade, as all manufacturers of such fabrics were accustomed to spin and weave it themselves.

The statement showed that a tax of five per centum had been assessed upon the full value of the skirts and shawls, and that the defendants had paid the amount of the tax. The tax in this case was a reassessment of those fabrics, made by the assessor of the internal revenue, adding a tax of five per centum upon the value of the yarn from which they had been woven. The parties agreed that the tax was assessed in the form prescribed by law; that the assessment was duly transmitted to the collector for collection; and that he duly demanded the tax from the defendants. It was also agreed that the taxes sought to be recovered were assessed and forwarded for collection under the act of June 30, 1864, and before the act of March 3, 1865 went into effect.

The increased value of the shawls over that of the yarn from which they were woven, was more than five per centum *ad valorem*.

Yarns of certain kinds are found in the market as commodities for sale, but yarn such as that from which these were made was not known in the market as an article of trade, all manufacturers of shawls spinning their own yarn and weaving it themselves into shawls.

It was claimed by the plaintiffs that the yarn and shawls made by the defendants in the manner already described were each to be considered under the internal-revenue laws as a separate and independent manufacture; and that there should be assessed and collected one tax upon the full value of the yarn spun by the defendants, and a second tax upon the full value of the

shawls made by them of this yarn, which they spun, without any allowance or deduction in fixing the tax on the shawls, for the yarn from which they were woven, and on which the defendants had already paid a tax.

The defendants contended that they should pay either one tax on the shawls for their entire value, and no tax on the yarn; or that, if they paid a tax on the yarn spun by them, then the tax on the shawls woven from the yarn should be only on the increased value of the shawls over that of the yarn from which they were made. It was admitted that the result of either of these modes of taxation contended for by the defendants was the same; that is, that a single tax upon the shawls for their full value was exactly equal in amount to one tax upon the yarn, and a second tax upon the shawls for their increased value over that of the yarn from which they are woven.

It was also admitted that the defendants had paid this amount in full. If, therefore, the tax on the shawls should be assessed in either of these modes, then judgment is to be entered for the defendants.

If, however, the defendants were subject to the tax as reassessed, that is to say, to a tax, first, on the whole value of their yarn, as one manufacture, and again on the entire value of the shawls made by them from the yarn, as a separate and independent manufacture, without any allowance in assessing the tax on the shawls, on account of the previous tax paid by the defendants on the yarn from which they are woven, and were obliged to pay the tax as reassessed by the assessor, as stated above, then judgment was to be for the plaintiffs for said amount of \$ 276.95, with interest from the date of the writ.

W. A. Field, Assistant United States District Attorney.

T. K. Lothrop and *R. R. Bishop*, for defendants.

CLIFFORD, J. The theory of the plaintiffs is, that the yarn is to be considered as a separate and independent manufacture, that a tax of five per centum should be assessed upon the full value of the yarn, and a second tax of the same rate upon the full value of the shawls and skirts, without any reduction or allowance for the tax on the yarn. The defendants deny that proposition and

contend, first, that they should pay no tax on the yarn, as they have already paid a tax upon the full value of the woven articles; second, that if they are held to pay a tax on the yarn, then the tax on the fabrics should only be for their increased value over the yarn from which they were made. Articles of dress for the wear of men, women, or children are, by the ninety-fourth section of the act of the 30th of June, 1864, declared to be subject to a tax of five per centum *ad valorem*. 13 Stat. at Large, 69. Mention need not be made of the proviso appended to that clause, as no question arises under it in this case, nor does it affect in any manner any question involved in the record. The only other clause of the section which needs to be particularly noticed is the one which also imposes a duty of five per centum *ad valorem* on all manufactures of wool in connection with many other manufactured articles, as therein mentioned and enumerated. 13 Stat. at Large, 270. The second proviso annexed to the clause last cited provides "that any cloth or fabrics as aforesaid, when made of thread, yarn, or warps, upon which a duty as aforesaid shall have been assessed and paid, shall be assessed and pay a duty on the increased value only thereof." Grant that the liability to taxation in this case arose under the second clause cited, then it is clear that the second proposition of the defendants is correct. Cloths or fabrics made of yarn upon which a duty of five per cent *ad valorem* had been assessed and paid were only liable to a like rate of duty upon their increased value over the yarn from which they were made. But the webs of shawls and skirts manufactured and sold by the defendants, as described in the agreed statement, were properly taxable under the clause first cited, and were actually taxed as articles of dress for the wear of men, women, and children, and that clause contains no words authorizing any such qualification as that contained in the second proviso annexed to the second clause. The absence of qualifying words, however, is not the only difficulty which the defendants have to encounter in their endeavor to maintain their second proposition, that if the yarn is taxed the taxation of the shawls and skirts should be restricted to their increased value, because the express provision of the same section is, that thread and yarn and warps

for weaving shall be regarded as manufactures, and shall be subject to a duty of five per cent *ad valorem*. Thread and yarn for weaving, therefore, as well as articles of dress for the wear of men, women, and children, are subject to taxation under the provisions of that section. Experience has shown that it is not safe, in framing revenue acts, to rely entirely upon any specific enumeration of the articles to be taxed. Such enumeration it is conceded is highly expedient to the extent that it is practicable. Where a general system of taxation is intended, Congress finds it necessary to add to such enumeration some general word or phrase to guard against omissions not intended, and vexatious inequalities. Words and phrases, such as wearing apparel, clothing, ready-made clothing, and articles of dress, may be found in most of the tariff acts passed within the last twenty years. Congress in adopting such terms undoubtedly intended to depart from the commercial designation as the test to determine the description within which the duty should or should not be charged, and to leave such determination to the test of the actual use of the article. *Maillard v. Lawrence*, 1 Blatch. 504. Shawls, as manufactured by the defendants, were ready for wear when they were sold by them, and the Balmoral skirts, as the agreed statement shows, were woven in patterns with stripes for borders, and that the skirt webs were intended for that use, and were "not fit and not used for any other purpose." They were woven in patterns, cut apart and sold by the defendants, and when so sold it is not doubted that they were properly regarded by the assessor as an article of dress for the wear of women and children, within the meaning of the clause in the Revenue Act under consideration. *Maillard v. Lawrence*, 16 How. 260.

The second general proposition advanced by the defendants is, that yarn such as that manufactured by the defendants was not subject to taxation under the revenue acts in force at the time the taxes in this case were assessed. The principal reason assigned in support of the proposition is, that yarn such as that from which these shawls and skirts were made is not known in the market as an article of trade. But the agreed statement shows that the defendants buy wool, spin it into yarn, dye or bleach the yarn,

and then weave it into webs for shawls and webs for Balmoral skirts ; and the act of Congress expressly provides that thread and yarn and warps for weaving shall be regarded as manufactures and be subject to a duty of five per centum *ad valorem*. The construction of the clause assumed by the defendants interpolates an exception not to be found in the provision. They agree that yarn for weaving, except such as is not known in the market as an article for trade, is declared to be a manufacture, and is subject to duty under that clause ; but the clause contains no such exception, and the court possesses no power to allow it. Reference is made to the fact that yarns manufactured exclusively for weaving under the act of the 1st of July, 1862, were not regarded as manufactures subject to duty, but the answer to that suggestion is that the law was changed by the subsequent Revenue Act. 12 Stat. at Large, 460 - 465 ; 13 Stat. at Large, 266.

Another suggestion is, that the amendment in the act of the 3d of March, 1865, is simply declaratory of the true construction of the clause in question, and that the court should regard the last-named provision as the true exposition of the one found in the prior act of Congress. 13 Stat. at Large, 477.

The purport of the amendments is, that thread and yarn and warps sold before weaving are still regarded as manufactures, but if the thread, yarn, or warp has paid the duty, the cloth, fabric, or article made of such thread, yarn, or warp shall be assessed only on the increased value. Such undoubtedly is the legal effect of the new provision, but it is not perceived that there is any ground whatever to suppose that the amendments were intended as an exposition of the prior law beyond what is true in every case where the new enactment substitutes a more lenient provision for one which was more stringent. The legal effect of the amendment is to repeal the clause in question and to substitute another in its place, approaching more nearly to the views of the defendants.

Taxable manufactures are such as are declared to be subject to taxation by an act of Congress, and it is immaterial whether such an article is known in the market as an article of trade or not, if it is a manufactured article, and is so declared to be sub-

ject to taxation, the courts must execute the law, and cannot ingraft upon it any exception not authorized by the terms of the enactment.

Objection is also made to the right of the plaintiffs to recover in this case, because it is insisted that the remedy by distraint, as given in the act of Congress, is the exclusive remedy in the case. 13 Stat. at Large, 258, 259; *Andover Turnpike v. Gould*, 6 Mass. 44; *Bangor House v. Hinckley*, 3 Fairf. 388; *Moncrief v. Ely*, 19 Wend. 405.

Extended argument upon this subject, however, is unnecessary, as the question is regarded as settled by the decisions of the Supreme Court. The same objection was made in the case of *Meredith et al. v. United States*, 13 Pet. 493, which was a suit for duties on imports. Duties due upon all goods imported, say the court in that case, constitute a personal debt due to the United States from the importer, independently of any lien on the goods or any bond given for the duties. *United States v. Lyman*, 1 Mas. 482.

Assumpsit for taxes imposed under the acts of Congress providing for internal revenue is also the proper form of action. *United States v. Cutting*, 3 Wall, 441; *United States v. Fiske*, 3 Wall, 445.

Judgment under the agreement of the parties must be entered in favor of the plaintiffs for the sum of \$2,804.45, with interest from the date of the writ.



APPENDIX.

NOTICE OF THE DEATH OF CHIEF JUSTICE TANEY.

At the opening of the Circuit Court of the United States for the First Circuit, holden at Boston, on the Term day, Saturday, the 15th of October, A. D. 1864, Judge CLIFFORD, stating that he understood that the members of the bar desired to take some notice of the death of the late Chief Justice TANEY, proceeded for that purpose, without transacting other business, to adjourn the court to Monday, the 17th of October, A. D. 1864, at twelve o'clock, M.

At the opening of the court on Monday, the 17th of October, A. D. 1864, RICHARD H. DANA, Jr., Esq., Attorney of the United States, rose and addressed the court as follows : —

May it please your Honor : —

The members of the bar of this court, desiring to notice in the most reverential spirit the death of the head of the judiciary of the United States, have assembled this morning and passed certain resolutions, which they have instructed me, as the law officer of the United States, to present to the court, with a request that they may be entered upon its records. Permit me, sir, also to express the hope entertained by the bar, that your Honor, as the associate and friend of the late chief justice, will be pleased to reply to the address from the bar.

Some of our members have had the acquaintance of Chief Justice Taney in private life. They cherish the recollection of his extreme courtesy, his simple dignity, and the fulness and charm of his instructive conversation. Those of us, who have appeared before the high tribunal over which he presided, desire

to place on public record our sense of the gratification afforded to us individually, and of the benefits conferred on the administration of public justice, by his peculiar faculty as a presiding officer, his great administrative abilities, and by the patient and unbroken attention he always gave to counsel addressing the court. And all the members of this bar, whether their knowledge of him has been official or personal, or only derived from the study of his judicial decisions, unite in acknowledging the purity of his private life, and those extraordinary intellectual qualities, working upon a fund of deep and rich legal learning, acquired by the enlightened industry of early and middle life, which have placed him in the very foremost rank of American jurists.

In the presence of your Honor, and of gentlemen who have known him so intimately in official and private relations, it is most becoming in me, whose acquaintance with him has been slight and recent, to do no more than to present the resolutions of the bar, and ask your Honor's permission to have them entered upon the records of the court.

Mr. Dana then read the proceedings of the bar, as follows:—

At a meeting of the members of the bar of the First Circuit, held at Boston, on Saturday, the 15th of October, A. D. 1864, to take measures for giving expression to the feelings of the bar on occasion of the death of Chief Justice Taney, the meeting having been called to order by Richard H. Dana, Jr., Attorney of the United States, Sidney Bartlett was appointed Chairman, and Elias Merwin, Secretary.

On motion of Mr. Dana, a committee, consisting of Benjamin R. Curtis, Caleb Cushing, Richard H. Dana, Jr., and Sidney Bartlett, was appointed to prepare and report resolutions for the consideration of the bar.

At an adjourned meeting, held Monday, the 17th of October, A. D. 1864, the following resolutions, reported by Benjamin R. Curtis in behalf of the committee, were unanimously adopted, namely:—

Resolved, That the members of this bar render the tribute of their admiration and reverence for the pre-eminent abilities, pro-

found learning, incorruptible integrity, and signal private virtues exhibited in the long and illustrious judicial career of the late lamented Chief Justice Taney.

Resolved, That the Attorney of the United States be requested to communicate these proceedings to the court, and ask to have them entered on the records of the court.

SIDNEY BARTLETT, *Chairman*.

ELIAS MERWIN, *Secretary*.

Mr. B. R. CURTIS then addressed the court : —

May it please the Court : —

I have been requested to second the resolutions which Mr. Attorney has presented. I suppose the reason for this request is, that for six years I was in such official connection with the late chief justice as enabled me to know him better than the other members of this bar. My intimate association with him began in the autumn of 1851. He was then seventy-three years old ; a period of life when, the Scripture admonishes us, and the experience of mankind proves, it is best for most men to seek that repose which belongs to old age. But it was not best for him.

I observe that it has been recently said, by one who had known him upwards of forty years, that during all those years there had never been a time when his death might not reasonably have been anticipated within the next six months. Such was the impression produced on me, when I first knew him. His tall, thin form, not much bent with the weight of years, but exhibiting in his carriage and motions great muscular weakness, the apparent feebleness of his vital powers, the constant and rigid care necessary to guard what little health he had, strongly impressed casual observers with the belief that the remainder of his days must be short. But a more intimate acquaintance soon produced the conviction that his was no ordinary case, because he was no ordinary man. An accurate knowledge of his own physical condition and its necessities ; an unyielding will, which while it conformed everything to those necessities, braced and vivified the springs of life ; a temper which long discipline had made calm and cheerful ;

and the consciousness that he occupied and continued usefully to fill a great and difficult office, whose duties were congenial to him, gave assurance, which the event has justified, that his life would be prolonged much beyond the allotted years of man.

In respect to his mental powers, there was not then nor at any time while I knew him intimately, any infirmity or failure whatever. I believe the memory is that faculty which first feels the stiffness of old age. His memory was and continued to be as alert and true, as that of any man I ever knew. In consultation with his brethren he could, and habitually did, state the facts of a voluminous and complicated case, with every important detail of names and dates, with extraordinary accuracy, and I may add with extraordinary clearness and skill. And his recollection of principles of law and of the decisions of the court over which he presided was as ready as his memory of facts.

He had none of the querulousness which too often accompanies old age. There can be no doubt that his was a vehement and passionate nature ; but he had subdued it. I have seen him sorely tried, when the only observable effects of the trial were silence and a flushed cheek. So long as he lived, he preserved that quietness of temper and that consideration for the feelings and wishes of others which were as far as possible removed from weak and selfish querulousness. And I believe it may truly be said, that though the increasing burden of years had somewhat diminished his bodily strength, yet down to the close of the last term of the Supreme Court, his presence was felt to be as important as at any period of his life.

I have been long enough at the bar to remember Mr. Taney's appointment ; and I believe it was then a general impression, in this part of the country, that he was neither a learned nor a profound lawyer. This was certainly a mistake. His mind was thoroughly imbued with the rules of the common law and of equity law ; and, whatever may have been true at the time of his appointment, when I first knew him, he was master of all that peculiar jurisprudence which it is the special province of the courts of the United States to administer and apply. His skill in applying it was of the highest order. His power of subtle

analysis exceeded that of any man I ever knew ; a power not without its dangers to a judge as well as to a lawyer ; but in his case, it was balanced and checked by excellent common sense and by great experience in practical business, both public and private. His physical infirmities disqualified him from making those learned researches, with the results of which other great judges have illustrated and strengthened their written judgments ; but it can be truly said of him that he rarely felt the need of them. The same cause prevented him from writing so large a proportion of the opinions of the court as his eminent predecessor ; and it has seemed to me probable, that for this reason his real importance in the court may not have been fully appreciated, even by the bar of his own time. For it is certainly true, and I am happy to be able to bear direct testimony to it, that the surpassing ability of the chief justice, and all his great qualities of character and mind, were more fully and constantly exhibited in the consultation-room, while presiding over and assisting the deliberations of his brethren, than the public knew, or can ever justly appreciate. There, his dignity, his love of order, his gentleness, his caution, his accuracy, his discrimination, were of incalculable importance. The real intrinsic character of the tribunal was greatly influenced by them, and always for the better.

How he presided over the public sessions of the court some who hear me know. The blandness of his manner, the promptness, precision, and firmness which made every word he said weighty, and made very few words necessary, and the unflagging attention which he fixed on every one who addressed the court, will be remembered by all.

But all may not know that he had some other attainments and qualities important to the prompt, orderly, and safe despatch of business. In the time of his predecessor the practice of the court is understood to have been somewhat loosely administered. The amount of business in the court was then comparatively so small, that this occasioned no real detriment, probably no considerable inconvenience. But when the docket became crowded with causes, and heavy arrears were accumulated, it would have been quite otherwise. The chief justice made himself entirely

familiar with the rules of practice of the court and with the circumstances out of which they had arisen. He had a natural aptitude to understand, and, so far as was needed, to reform the system. It was almost a necessity of his character to have it practically complete. It was a necessity of his character to administer it with unyielding firmness. I have not looked back to the reports to verify the fact, but I have no doubt it may be found there, that even when so infirm that he could not write other opinions, he uniformly wrote the opinions of the court upon new points of its practice. He had no more than a just estimate of their importance. The business of the Supreme Court came thither from nearly the whole of a continent. It arose out of many systems of laws, differing from each other in important particulars. It was conducted by counsel who travelled long distances to attend the court. It included the most diverse cases, tried in the lower courts in many different modes of procedure. Some according to the course of the common law; some under the pleadings and practice of the courts of chancery in England; some under forms borrowed from the French law; many under special laws of the United States framed for the execution of treaties; and many more so anomalous that it would not be easy to reduce them to any classification. And the tribunal itself, though it was absolutely supreme, within the limits of its powers, was bounded and circumscribed in its jurisdiction by the Constitution and by acts of Congress, which it was necessary constantly to regard. Let it be remembered, also, for just now we may be in some danger of forgetting it, that questions of jurisdiction were questions of power as between the United States and the several States. The practice of the court therefore involved, not merely the orderly and convenient conduct of this vastly diversified business, drawn from a territory so vast, but questions of constitutional law, running deep into the framework of our complicated political system. Upon this entire subject the chief justice was vigilant, steady, and thoroughly informed. Doubtless it would be the tendency of most second-rate minds, and of not a few first-rate minds, to press such a jurisdiction out to its extremest limits, and occasionally beyond them; while for timid men, or for those who might

come to that bench with formed prejudices, the opposite danger would be imminent. Perhaps I may be permitted to say, that though on the only important occasions on which I had the misfortune to differ with the chief justice on such points, I thought he and they who agreed with him carried the powers of the court too far, yet, speaking for myself, I am quite sure he fell into neither of these extremes. The great powers intrusted to the court by the Constitution and laws of his country he steadily and firmly upheld and administered; and, so far as I know, he showed no disposition to exceed them.

I have already adverted to the fact that his physical infirmities rendered it difficult for him to write a large proportion of the opinions of the court. But my own impression is that this was not the only reason why he was thus abstinent. He was as absolutely free from the slightest trace of vanity and self-conceit as any man I ever knew. He was aware that many of his associates were ambitious of doing this conspicuous part of their joint labor. The preservation of the harmony of the members of the court, and of their good-will to himself, was always in his mind. And I have not the least doubt that these considerations often influenced him to request others to prepare opinions, which he could and otherwise would have written. As it was, he has recorded many which are important, some of which are very important. This does not seem to me to be the occasion to specify, still less to criticise them. They are all characterized by that purity of style and clearness of thought which marked whatever he wrote or spoke; and some of them must always be known and recurred to as masterly discussions of their subjects.

It is one of the favors which the providence of God has bestowed on our once happy country, that for the period of sixty-three years this great office has been filled by only two persons, each of whom has retained, to extreme old age, his great and useful qualities and powers. The stability, uniformity, and completeness of our national jurisprudence are in no small degree attributable to this fact. The last of them has now gone. God grant that there may be found a successor true to the Constitution, able to expound and willing to apply it to the portentous questions which the passions of men have made.

CALEB CUSHING, Esq. then addressed the court as follows : —

May it please your Honor : —

I, also, have been placed in official and personal relations with the late Chief Justice Taney, which, although not so close as those of Mr. Curtis, his associate on the bench, yet suffice it to render it an act of public duty on my part, as well as of individual respect, to address the court on this occasion, and to manifest in imperfect words my profound reverence of the person and the memory of the venerable and venerated chief justice.

I do this, I undertake to speak of his life and character, with something of the same emotion as if that great magistrate, in all the gravity of his rank and station, were now before me in corporal presence on the bench.

He had presided over the majesty of the Supreme Court during the long period of almost a complete historical generation of the human race, so that for us of this day he had become the living voice of the law, — *reipublicæ lex loquens*. He was one of those men who possess such tenacity of vitality as half to suggest that the human body may sometimes endure to extreme old age by the mere force of a great mind within it, as if the will had power to withstand physical decay, and repel the attacks of death. He had inducted into office nine Presidents of the United States ; and as he stood on that historic eastern front of the Capitol, the Republic's "giant steps," in the lofty dignity of his great form and office, year after year witnessing and assisting at the rise and fall of parties, of administrations, of dynasties, all else seemed to be transitory as day and night, evanescent as dream-spectres, whilst he and it were stable and monumental alone in this government. Take him for all in all, it is not too much to say that he worthily filled the high place, which Jay and Ellsworth and Marshall had already rendered illustrious, exhibiting in his life, like them, that supreme type of nobleness, which no hereditary charters of greatness can bestow, but which consists in the unmistakable impress of genius stamped upon his human work by the master-hand of God.

Compared with them, his intellectual character had more of

unity and simplicity, because it was more exclusively juridical ; as he never entered Congress, and as no part of his life was occupied with political debate or agitation ; and he exercised functions other than legal only during the brief period, that, accidentally as it were, and not from chosen vocation, he filled the office of Secretary of the Treasury. With this exception, and with some further exception as a member of the Legislature of his State, his long life was passed either at the bar of the State of Maryland or of the United States, or on the bench of the Supreme Court.

His professional career was nearly contemporaneous with the judicial career of Chief Justice Marshall, to whose political school he belonged ; and as Marshall and he together held the office of chief justice for more than sixty-three years, Marshall upwards of thirty-four years, and Taney upwards of twenty-eight years, they together, and their learned associates, may be said to have built up the great construction of our Federal jurisprudence, of which the foundations only were laid in the time of Jay and Ellsworth. As a member of the bar and as Attorney-General of Maryland, and as a member of the bar and Attorney-General of the United States, he prepared himself, as your Honor has since done, for the discharge of the higher and larger duties of the bench.

His opinions, therefore, as they appear in the six last volumes of Peters, in the twenty-four volumes of Howard, and in the three volumes of Black, compose the great records of his judicial life ; and they constitute a monument of usefulness, and a title of fame deserving to be placed on a level at least with the opinions of any of the most renowned magistrates of France, of England, or of the United States.

As matter, and as reasoning, they are distinguished by completeness of learning, by comprehensiveness of grasp, and perspicacity of thought, by logical precision, clearness and perfection of argument, and by conclusions which command our respect, and not seldom our assent, even when contrary to those of the majority of the court.

As rhetorical style, they are of unsurpassed excellence, and perfect models of judicial composition. The diction is pure and

chaste, without solecisms of word or grammar ; the sentences are well constructed ; the thoughts are systematically arranged ; the propositions are symmetrical, with their conditions or qualifications, not patched on rudely, or loosely scattered about, but incorporated into the sentence or paragraph ; and the whole shows signs of the *limæ labor* of a skilful hand and well-trained intellect.

In illustration of all these qualities, we may point to his opinion in the case of *The Genessee Chief*, which reversed the law of the court, as laid down by Marshall, on the question of admiralty jurisdiction in the navigable fresh waters of the United States ; his dissenting opinion in *Smith v. Turner*, and *Norris v. Boston*, commonly called the Passenger Cases ; and his opinions in the case of *Luther v. Borden*, and the case of *Ableman v. Booth*.

His deportment towards the bar was uniformly attentive, courteous, and kind, self-respecting, and, therefore, respectful ; which was the more important, not only because he, of course, spoke for the court in its official communications with the bar, but because he generally pronounced the law on all questions of the practice of the court.

Of the inner qualities of the judicial character of the chief justice, as observed by his associates on the bench, who alone could see and appreciate those qualities, Mr. Curtis has spoken in terms of cordial praise befitting himself and the subject ; and your Honor cannot fail to bear similar testimony to the exalted virtues of a cherished friend and respected chief.

I speak of the private character of the chief justice only to say that it was such as became his public life ; tender and affectionate in domestic relations, courteous with a sort of gentle stateliness of courtesy in social intercourse, dignified and yet of unaffected simplicity in all things, so that in his presence one felt the sense of his greatness, not oppressively but pleasurably, as a force that warmed and cheered, while it also attracted and elevated all within the scope of its influence. You forgot, then, the great and lofty magistrate, and saw only the high-toned gentleman, the wise and good man, on whose ordinary life the weight of conscious power rested as gracefully as the robes of office which invested him on the bench.

May it please your Honor, such, after twenty-eight years of personal observation and knowledge, are my impressions of the judicial career and public and private character of Chief Justice Taney.

And permit me now in conclusion to touch, and but to touch, a class of considerations, which are in all men's minds, and of which not to speak at all might be taken to imply that nothing can be appropriately spoken.

We live in a country of republican institutions, where debate, oral and written, is free even to licentiousness; where political parties or factions occupy the field of public affairs; and where all conspicuous persons are subject alike to unmeasured praise or unmeasured blame according to the prevalent passions of the hour. If, as Lord Palmerston once said, the agitations of opinion are the consumers of life, so they are also the creators of life, in all elective governments. They are the drawbacks on the blessing of liberty, they are the price at which greatness is purchased. None, therefore, traverse the troubled sea of political affairs without being tossed or buffeted by the waves or winds of party opinion.

Thus it happened to Taney; but so also it happened to Jay, to Ellsworth, and to Marshall. Each of them passed from political life to the bench. Nay, more, Jay held the appointment of Envoy Extraordinary to Great Britain, and Ellsworth that to France, each while continuing for a while to be chief justice; and Marshall exercised at the same time the functions of Secretary of State, and of chief justice. Be sure that each of these great men, either before, or after, or during his tenure of the chief justiceship, performed some political act not less unacceptable to adversary parties than any performed by Taney while Secretary of the Treasury. Be sure, also, that if it were worth one's while, on a solemn occasion like this, to deal seriously with any of these futilities of bygone controversy, it would be easy for me to cite opinions of Marshall, to say nothing of Jay and Ellsworth, which occasioned at the time not less of party sensibility than any one of Taney's.

But enough of this. If we refuse to be just even to the great men of our country while they are living, we can afford to be

generous to them when they are dead, and when they cease to stand in the pathway of our convictions, our interests, and our ambitions. When their human forms no longer move and speak and act, but come to be fixed and silent on the canvas of history, when the mortal man has put on immortality, and he but appears to us in memory like one of the disembodied shadows of statesmen and heroes in the divine visions of Dante, then, if living he were truly great, he looms up the more grandly in death, his proportions magnified in the haze of the distance, the faulty points shaded over and filled up, but the mighty outlines imaged to the eye with tenfold distinctness and vividness of perception. Thus, in my judgment, will the world see Taney hereafter, as it now does Jay and Ellsworth and Marshall. And he, like them, so long as the memory of present time endures, will stand secure on the pedestal of the ages, statuesque in his ermined dignity, colossal in his intellectual lineaments, to be admired and honored, — and may we not hope to be emulated? — as one of the greatest among the great men of America.

CHARLES L. WOODBURY, Esq., then addressed the court as follows : —

May it please your Honor : —

The eulogy upon the intellectual ability of the late chief justice I may well leave to abler hands than mine, to the leaders of this bar, whose discrimination and experience so well fit them to the duty.

I have risen simply as one who probably has known the late chief justice longer than any other member of this bar, to offer the tribute of my respect. In my youth the residence of my father was for many years in close proximity to his, and in the daily intercourse of families it was my privilege to see him frequently in his domestic circle. Afterwards, when called to the bar, I had occasions in the Supreme Court to feel his personal kindness, and to observe that it was extended considerably to all the younger members of the bar. As a student and young lawyer in that section, I always found the local fame of Mr. Taney as the first lawyer of Maryland, since the palmyest days of Luther

Martin, an axiom of belief. The late chief justice was not merely the calm, dignified, and untiringly laborious cabinet minister and judge as all saw him. That placid exterior was not the result of apathy, nor did it denote an emotionless nature. Within the depths of his character there was a great and stormy energy; within his heart there was a depth and power of passion that stirred and woke his intellectual nature to the highest efforts of his genius. He knew how to govern himself. Like General Washington, his entire self-control, and that perfect self-command to which his iron will had subjected his whole physical nature, gave him that loftiest of moral dignity, inspiring awe as well as admiration at his equitable and emotionless conduct. He was a chief. Had he been a soldier he would have been a hero. For forty years that great man has occupied most distinguished positions in the state, with a personal bearing as unruffled as if no storm could sweep the surface. And yet, amid all this native strength of character and powerful self-control, his domestic virtues were most fully developed and of the kindest nature.

Mr. Taney accepted his judicial position as an end; and it is, I think, safe to say that he had no political ambition. His highest eulogy, and the one most befitting the lofty station that he filled, was that in all his official and private intercourse his conduct was always becoming the high-toned gentleman, and believing Christian, which he professed himself to be before the world. Heaven grant that in the future our country may have other chief justices as great and good as him.

His Honor JUDGE CLIFFORD then spoke as follows:—

The court cordially concurs with the members of the bar in their testimony of respect to the memory of Chief Justice Taney, and will cheerfully, but with heartfelt sorrow, comply with their request to place the resolutions they have adopted upon the records of the court.

Death has removed from the high sphere of his duties the venerable chief justice of the Supreme Court of the United States, and it is eminently fit and proper that the members of this bar should pause in the midst of their usual avocations and

give public expression to their sense of the great loss they have sustained, and to the profound respect and veneration they entertain for the exalted private virtues and distinguished public services of the great magistrate, whose earthly career is now closed forever. Rest assured that the court fully approves the resolutions you have adopted, and will heartily unite with you in responding to the sentiments which they contain. Such a manifestation of the sense of the great loss which has been sustained in his death, not only by the bench and the bar, but by the whole people of the United States, is no more than what is befitting this occasion, and entirely accords with my own views and feelings upon the subject. Having enjoyed his confidence for more than a quarter of a century, and for six years last past been associated with him in the bench of the Supreme Court, I should do injustice to my own feelings if I omitted to say that none can fully appreciate the extent of the loss which the surviving members of the Supreme Court have sustained, except those who have known him intimately, and often met him at the private consultations and conferences of the court. All such must forever feel that the whole country has peculiar and lasting cause to mourn his loss as a great and good man, and as a learned, wise, and just magistrate.

Unreal greatness of every kind always diminishes as you approach it, but true judicial greatness shines even brighter in the conference-room than in the bench or in the forum of public discussion. Those who have often met him in those weekly conferences best know the great value of his public services, because the best opportunities were afforded there to witness his unerring love of justice, the exhibitions of his profound experience, and the clearness, strength, and comprehension of the logical resources of his mind. Justice requires me to say that, in his hands, the most complicated causes were made plain, and the weightiest and most difficult questions became of ready and easy solution, and yet he was as willing to concede to his associates the right of independent judgment as to exercise it himself; and in cases of real doubt and difference of opinion was as prompt as any of them to modify or even yield his first impressions. Extended remarks upon his recorded judgments

are unnecessary, as that duty has been well performed at the bar. Undoubtedly they constitute the great legacy he has left to his country, and it does not require the gift of prophecy to foretell that they will have the effect to preserve his memory in grateful remembrance as long as the Constitution of the United States, and the institutions of free government which it ordains, shall endure. Suffice it to say upon this subject, that, in my judgment, the opinions delivered by the chief justice during the long period he presided in the Supreme Court of the United States, are unsurpassed as clear, logical, and correct expositions of law, if due regard be had to their number, to the magnitude of the controversies, and the scope and variety of the questions which the controversies involved.

Chief Justice Taney was a native of Maryland, and was born on the 17th of March, 1777, in Calvert County, in that State. His ancestors were among the earliest settlers of the State, having emigrated from England to that Colony in the time of the Protector. Most of them were Catholics, and for many years they experienced the disabilities incident to their religious faith, under the intolerant legislation of the parent country. Better times, however, were approaching, and when the people of Maryland adopted their Constitution, in 1776, they abolished all such distinctions, and established full equality of political privilege, irrespective of religious opinion. Subsequent to that period, the father of the subject of these remarks was repeatedly elected to represent his native county in the lower house of the Legislature, and ever after enjoyed the full benefits of religious toleration. Influenced, perhaps, by those considerations he afterwards sent his son, Roger B. Taney, to Dickenson College, in the State of Pennsylvania, which was under the superintendence of Protestant professors. Persons who knew him well have often remarked that it was there that he learned his views of religious toleration, and it was there, also, that he completed his classical education. Choosing the law for his profession, he commenced its study at Annapolis, in 1796, the year after he graduated. As is well known, he read law with Jeremiah T. Chase, Chief Justice of the General Court of the State, and was admitted to practice in three years after he commenced the study. When admitted to the bar

he immediately returned to his native county to practise his profession, and in the autumn of the same year, when but twenty-three years of age, was elected a delegate to the General Assembly of the State. Contemporaries agree that he displayed in the Assembly an intrepidity of character and an uprightness of motive which secured for him the esteem and admiration of his associates, but he declined a re-election with a view of applying himself more closely to the practice of his chosen profession. Actuated by the motive of enlarging his business, he left his native county and removed to the county of Frederic, where he resided for twenty-two years. While residing there, in 1816, he was elected to the Senate of the State, and served with great distinction as senator for the term of five years. Politics, however, had not sufficient charms to tempt him to abandon the favorite pursuit of his life. On the contrary, the universal testimony is, that during the period he resided there he very much increased his practice, and that it embraced the widest range of subjects and every description of civil and criminal jurisprudence, which, doubtless, had the effect to lay even more deeply than had been done in his preparatory studies, the foundations of those solid professional attainments, which so eminently fitted him for the performance of the still higher class of duties which devolved upon him in after life. Evidence is not wanting to show that his competitors at the bar, during that period, were jurists and advocates of the very highest order of talent, as will abundantly appear by a reference to the judicial reports of the State. Mention need only be made of Pinkney, Martin, Harper, and Winder, but there were a host of others of less age, just advancing into the first rank of the legal profession. Powerful as was the competition, still his practice, as has been well remarked by a distinguished writer, was constantly increasing, and in a brief time became both extensive and lucrative, "not only in the county courts in the judicial district where he resided, but also in the Court of Appeals." Considerations, growing out of the increase of his business, induced him, upon the death of Mr. Pinkney, to accept an invitation to remove to the city of Baltimore, from which came a large portion of his commercial practice. One who knew him well says that the field was too

tempting to be shunned, and that he "entered upon it in the full vigor of his faculties, with an established reputation and with talents and attainments that fitted him to maintain it against all opposition."

After his removal to Baltimore the field of his professional practice was very much enlarged. Several of his former competitors had been removed by death, and his services were now sought, on one side or the other, in most of the controversies of great magnitude, litigated in the tribunals of the State, and he at once entered upon the more enlarged sphere of practice in the Supreme Court at the city of Washington, over which he has since presided for so many years. Additional labor was also devolved upon him a few years later by his acceptance of the appointment of Attorney-General of the State. The appointment was made in 1827, and it appears that he continued to hold the office until June, 1831, when he resigned it upon receiving the appointment to the same office under the Federal government. Power of appointment, when he was commissioned as Attorney-General of the State, was vested in the Governor and Council, and the fact that he was known to be opposed to those functionaries when the office was tendered to him furnishes but one among many evidences which exist to show that a high estimate was placed upon his personal character and professional qualifications. Beyond doubt he was, at that period, the leading advocate at the bar of his native State. Old competitors had passed away or been left behind, and he remained without a rival; but in a few years a new and equally accomplished competitor appeared to compete for the first honors of that distinguished bar. William Wirt removed to Baltimore in 1829, still possessing all the power and eloquence which he had displayed in his earlier practice in that city, and which had characterized his brilliant efforts as Attorney-General in the Supreme Court of the United States. Comparison between those distinguished advocates will not be attempted, as it is well known that "their professional talents were as diverse as their manner at the bar and their style of elocution." Reference to the judicial records will show that they often met, and it will be sufficient to say that the exact and comprehensive legal knowledge of the chief justice, together with

his calm and clear logic, made him a full match for his polished and impassioned competitor, and that he came out of the contest with a reputation greatly increased, as all his contemporaries freely admit.

But circumstances over which he had no control soon opened a new field for the employment of his professional talents. Difficulties in the Cabinet of General Jackson induced Mr. Berrien to resign the office of Attorney-General of the United States, and in June, 1831, the President having come to the conclusion to reconstruct the Cabinet, tendered Mr. Taney that office, which he accepted; and he continued to discharge its duties with unsurpassed ability and success until, at the earnest solicitation of the President, he resigned it to accept the office of Secretary of the Treasury. His appointment as Secretary of the Treasury was made in September, 1833, and on the 22d of the same month he issued the celebrated order for the removal of the deposits. By that order he gave great offence to a majority of the Senate, in consequence of which his nomination was rejected, and he returned to the city of his residence to practise his profession. Whatever explanations of these events are necessary have already been given at the bar, and need not be repeated. Enjoying the confidence of the President, as he did, it was hardly to be expected that he would long remain in private life, and, accordingly, upon the resignation of Mr. Justice Duval, in January, 1835, he was nominated as an associate justice of the Supreme Court of the United States, but the Senate refused to entertain the nomination, except to postpone it indefinitely on the last day of the session.

Chief Justice Marshall died on the 6th of July, 1835, and on the 28th of December following, the President sent to the Senate the name of Roger B. Taney for the office of chief justice of the Supreme Court, made vacant by the death of that illustrious magistrate. But the Senate did not act upon the nomination until the 15th of March following, when it was confirmed by a large majority. Further comment upon his judicial opinions will not be attempted, except to say that they are invariably based on principle more than on decided cases, as may readily be seen by consulting any one of the thirty-three volumes where they are to

be found. Taken as a whole they constitute an imperishable monument to his memory, which needs no further inscription to insure its transmission to future ages. Great as is his loss to the country, it is even greater to the surviving members of the court over which he so long presided, because to them it is irreparable.

Irreparable, I repeat, not only on account of his great experience and profound knowledge, but also on account of his pre-eminent ability and success in presiding over the deliberations of the court. Some of the duties incident to that position are as delicate as they are important, and yet he always performed them to entire acceptance. Indeed, his whole intercourse with his associates was characterized by such a sense of justice and impartiality, and by such an unrivalled equanimity, exemplary benignity of temper, and amenity of manners, that no one of the number ever had the slightest cause of offence.

Nothing need be said of his private life, as all concede that it was eminently worthy of the exalted character he sustained in all the public stations which he filled. Attempts have been made to call in question his patriotism ; but I think it my duty to say, what I sincerely believe, that the charges were as unfounded as they are now harmless to the object of their attack. Gone to the grave in the full fruition of his honors, his reputation is above the reach of any such reproach. Reverence for the Constitution of the United States was a leading characteristic of his judicial life, as every one knows who was ever associated with him in the bench, and as all others may know if they will but consult his judicial opinions upon constitutional questions. He revered the Constitution as the great result of the Revolution, and as having been ordained "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty" ; and I have no hesitation in declaring that there is not an act of his life inconsistent with that profession.

Pursuant to the request of the members of the bar it is ordered that the resolutions which have been read shall be placed upon the records of the court.

NOTICE OF THE DEATH OF JUDGE PITMAN,

DISTRICT JUDGE OF RHODE ISLAND.

At an adjourned meeting of the members of the bar of the Rhode Island District, on Monday morning, November 21, 1864, the following resolutions, reported from the committee previously appointed upon the subject, were unanimously adopted:—

Resolved, That the death of JOHN PITMAN, District Judge of the United States for the Rhode Island District, though an event in the course of nature at his advanced age of fourscore years, has, by its suddenness, in the midst of his labors, unannounced, in the still night when no man keepeth watch, filled us with awe and dread in presence of that august Power in whose hands are the issues of life.

Resolved, That in recalling the judicial career of Judge Pitman, whether as witnessed by and known to ourselves or as derived from those who knew him in earlier years, we behold only virtue and goodness, an enlightened intelligence, untiring industry, unwearied patience, a clear perception, a sound mind, a conscientious love of truth and justice, uncorruptible integrity, unblemished honor, and a true humanity.

Resolved, That though it is our peculiar province, as members of the legal profession, to express our sense of the character and worth of the deceased as a lawyer and a judge, we would not fail to recognize the common bereavement of the whole community in the loss of an able, upright, and faithful magistrate, an exemplary citizen and a good man, whose unsullied public and private virtues won for him the respect and honor of all men throughout his long and useful life, and have secured for him an affectionate, lasting remembrance in death.

Resolved, That while we would not intrude upon the sanctity of private grief, we respectfully tender our sincere condolence to the family of the deceased in their great bereavement.

Resolved, That Wingate Hayes, Esq., be requested to present these resolutions to the United States Circuit Court now in session in Providence, with a request that they be entered upon the minutes of the court as a tribute of respect to the deceased.

Resolved, That as a further mark of respect we will attend the funeral of the deceased in a body ; and that these resolutions, signed by the chairman and secretary, be communicated to the family of the deceased, and published in the daily papers.

SAMUEL CURREY, *Chairman*.

JAMES TILLINGHAST, *Secretary*.

Proceedings in the United States Circuit Court.

The United States Circuit Court convened, pursuant to adjournment, in the court room, on Monday morning at 11½ o'clock, Judge CLIFFORD presiding. There was a large attendance of the members of the legal profession. Hon. WINGATE HAYES, at the request of his associates of the bar, presented and read to the court the foregoing series of resolutions, and made the following address : —

May it please the Court : —

The members of the bar of this district have requested me to present to the court certain resolutions adopted by them as a tribute of their respect to the memory of the late Hon. John Pitman, Judge of the United States District Court for this district.

In performing this duty it may not be improper for me to refer to some of the prominent events of his life, leaving to your Honor, from whom the bar hope to have a response to their resolutions, and to my older brethren, who enjoyed a longer and more intimate acquaintance with Judge Pitman, to speak of those qualities of head and heart which particularly distinguished him.

Judge Pitman was born in Providence, February 23, 1785. He graduated at Rhode Island College (now Brown University) in 1799, having entered that institution in the tenth year of his

age. He received from the same University in 1843 his degree of Doctor of Laws, and at the time of his decease had been one of its trustees or fellows for more than thirty-six years. Upon leaving college he entered the law office of Hon. David Howell, who was afterwards his immediate predecessor as District Judge, and pursued the study of the law there, and at Poughkeepsie, N. Y., and in New York City, for nearly seven years, when arriving at the age of twenty-one, and becoming eligible to admission to the bar, was admitted to practise in the Mayor's Court of New York in June, 1806, — De Witt Clinton signing his certificate of admission, — and in the Supreme Court of that State in the August following, his certificate then being signed by Chancellor Kent. He opened an office in New York City, but in the spring of 1807 went to Kentucky, where in the September following he was admitted to the bar, and practised law until September, 1809. He then returned to Providence and practised his profession until 1812, when he removed to Salem, Mass. There he formed the acquaintance of Judge Story, an acquaintance which ripened into an intimate friendship, and was terminated only by the death of that distinguished jurist. Mr. Pitman remained in Salem four years, and then opened an office in Portsmouth, N. H., where he practised law from 1816 to 1820.

The events of the period during which he resided at Salem and at Portsmouth, and the associations and influences by which he was surrounded, were well calculated to develop those traits of mind and of character which marked him during the remainder of his life. The war between this country and Great Britain, and the complicated and important questions growing out of it, furnished a large business to those lawyers whose learning and skill commanded the confidence of the community. Mr. Pitman soon entered upon an extensive practice in the prize courts, and drew, it is said, — with what truth I do not know, — the first libel in prize under the Constitution of the United States. The reports of the United States Circuit Court and of the Supreme Court of the United States attest with what ability and success in the discussion of the law of prize he met in those forums; the leading advocates of the country, some of whom, like Mr. Dexter and Mr. Webster, became, and remained for life, his personal

friends. At the New Hampshire bar he came in contact with such men as Mason, Jeremiah Smith, Bartlett, Sullivan, and the Bells, — names your Honor will readily recognize, of lawyers in the front rank of their profession.

In 1820 he returned to his native town, where he continued to reside ever afterwards, with the exception of a few years which he passed at his country residence on the shores of Narragansett Bay. In December, 1820, he was appointed district attorney, and in 1824, district judge, which office he held for forty years, and until the time of his decease. On Tuesday last, in the absence of your Honor, Judge Pitman presided in this court, and delivered the charge to the grand jury. On Wednesday and Thursday he sat by your side, attentive and interested as usual in all the business of the court. Thursday night his spirit passed away.

The death of Judge Pitman, at any time, could not fail to be an event of melancholy interest to this community. Occurring as it did in the daily performance of his judicial duties, stricken down almost in our very presence, the public, and especially the members of this bar, have received the intelligence with the most profound emotion.

While I would not intrude upon the province of others in attempting an estimate of the judicial character of Judge Pitman, I may be permitted the single remark that no man could see him upon the bench without being impressed with his perfect impartiality, firmness, and love of truth. He was *justum et tenacem propositi virum*.

Hon. SAMUEL CURREY then addressed the court as follows : —

May it please your Honor : —

I have much to regret the absence on this occasion of the Hon. Richard W. Greene, the senior practising member of the bar in this district. I have just received a letter from him stating that illness prevents his attendance here, and requesting me to express to the court his regret at being absent on this melancholy occasion, as well as the deep sympathy that he felt with the court in its bereavement, and also his own sorrow at the loss of a personal

friend, with whose career as a lawyer and a judge, and whose character as a man, he had been acquainted for a great number of years, and with whom he enjoyed the warmest friendship.

Judge Pitman was an old man comparatively, when I first knew him. He had already sat a number of years upon this bench. I formed his acquaintance, and I recall it now with pleasure and with emotion, under his own roof, in the sanctuary of his own home, when I was a young man and a student in college here thirty years ago. I recall with pleasure and pride his kindness, his generous, urbane hospitality, his gracious deportment and manner to me as a young man, as gentle as a woman, as simple as a child. I have had the pleasure — and I have always esteemed it a great one — of enjoying his friendship from the first to the last of my acquaintance with him. Many changes have occurred within those thirty years, but none in Judge Pitman, except — the effect of advancing years — an increasing goodness and sincerity of character. I think, sir, I but express the sentiment of this whole community, and the entire circle of Mr. Pitman's friends and acquaintances in Rhode Island and out of it, when I say that he was a singularly pure, upright, and honest man, — the highest and the best attainment of humanity, and the noblest work of God. To say that he was an impartial judge, is only to say what was almost self-evident to every man. To say that he was an honest judge, is to say that he attained to the highest honesty of which human nature is capable. To say that he lived his long life, that he officiated in his long judicial career without blemish and without censure, without spot or imperfection of any kind, except what necessarily pertains to humanity, is but to say what every heart feels on this occasion.

Judge Pitman's career was an enviable one. To be a judge is to fill a high place in human society. To be a judge and to render satisfaction to the community in which his magistracy is exercised is the greatest honor that can befall a man, as it is the highest attainment of our laborious profession. But to have been associated many years in his judicial career with such men as your Honor's predecessors on this bench, with Judge Curtis, with Judge Woodbury, and for a much longer course of years with the illustrious Judge Story, was something to be written in

any man's biography. I know from the testimony of the jurists to whom I have referred (and I never heard anything to the contrary from any of them), that he enjoyed in a singular manner the friendship, confidence, and love of your Honor's predecessors on this bench. I am not able to go behind the period of my own experience, but that experience extends as a professional man over more than twenty-five years in this court; and during that period I have always admired the patience, the industry, the calmness, moderation, firmness, and dignity of Judge Pitman, both when he has been sitting with his associate chiefs and when he has been sitting alone.

I remember an instance which I may be permitted on this occasion to mention. Some years since when he had a laborious case to decide, he said to me, as I happened to be in his office on chambers business: "Have you given attention to such a question of law? I have been trying to get at the foundation of that question; I believe the more I study into the law, the further I am from reaching the sources of its knowledge." He stated to me what the question was and how much time he had bestowed upon it. And I recollect subsequently hearing his written opinion or decision upon the case, which embraced a very wide examination of statute and common law. This instance is but one of many I could mention, detailed to me by members of the profession older than myself and now passed away, by gentlemen who enjoyed his friendship, who were intimate with him as a man and familiar with his character and his labors as a judge, and who entertained toward him the same high opinion which I had formed and have now endeavored feebly to express.

To-day, your Honor, we part with this eminent man forever. His place among the living is vacated. He has withdrawn. But the philosophic mind, and yet more the Christian mind, cannot help tracing him in a future life. And as we stand here to-day to do him honor, to recall the life that he lived here, the character he exhibited here, the virtues he possessed here, the purity and uprightness of the man, the sincerity of the Christian, we can feel no uneasiness as to his condition in the future and the better world. He died in a good, honored age. He died, as far as we know, without suffering and without a pang; and we can say,

"Peace and honor be to his grave, and immortal happiness to his spirit," as we bid him, to-day, farewell.

Judge CLIFFORD responded as follows:—

The court cordially concurs in the resolutions presented by the bar as a tribute of respect to the memory of the late Judge Pitman, district judge of the United States for this district. Your request; also, that the proceedings of the bar may be placed upon the records of the court is a very proper one, and one which receives the ready assent of the court. Considering the kindly relations always subsisting between Judge Pitman and myself since our acquaintance commenced, I cannot suffer the occasion to pass without remarking upon the circumstances under which they have been sundered, and expressing my own deep sense of the loss which the court, the bar, and the public have sustained in his death. You all know that the present session of the court was opened by him in my absence on the 15th of the present month, and that he presided during its organization and delivered the charge to the grand jury. On the following day he sat by my side during the greater portion of the session, and concurred in the opinion which was read at the opening of the court. Towards the hour of adjournment, but before the session closed, he signified his intention to retire on account of ill health. Pursuant to his usual course on such occasions, he requested that the trial of the cause before the court should proceed, leaving it to be inferred that he would shortly return. Supposing that he would presently resume his seat on the bench, I acquiesced in the suggestion, and the trial of the cause proceeded. When he left his seat I have no doubt he expected to find relief in the open air, and that he in a brief period would be able to return; but he was disappointed in that expectation. Failing to find the expected relief, he left and went to his residence, and at the usual hour in the evening retired to rest. Whether he slept or not is not known, but when morning came it was found that his spirit had fled to Him who gave it, and it may confidently be hoped to receive the reward of an upright, faithful, and unoffending life.

Such, in brief, are the circumstances under which your and my official relations to the deceased have been suddenly terminated ; and I cannot but think that they are such as should admonish us all that in the midst of life we are in death, and that no one here knows who will next be called to give his final account. Happy indeed will it be for that one, whoever he may be, if he can hopefully expect to be as well prepared for the solemn event as was the subject of these remarks.

Judge Pitman was born in this city on the 28d of February, 1785, about two years after the treaty of peace. Nativity, however, was by no means the only tie which bound him to your locality. On the contrary, it was here that he received his classical education, and it was here also that he pursued the study of the legal profession as the chosen pursuit of his life. Having completed his preparatory studies, he entered Brown University in September, 1795, and graduated there with the degree of Bachelor of Arts in four years after he was admitted. Shortly after he graduated he entered the office of David Howell, Esq., afterwards district judge of the United States for this district, and completed his studies in his office. Like most young men, when first admitted to the bar, his first inclination was to leave his native city and to endeavor to earn success and distinction in some other locality. Accordingly he practised law for a short time in the city of New York, and afterwards at Salem, in the Commonwealth of Massachusetts, and then removed to Portsmouth, in the State of New Hampshire, where he remained for four years. During the period last mentioned, he was brought in contact with some of the ablest jurists in the United States. Rockingham bar at that period had enrolled among its members such men as Webster, Mason, Smith, Sullivan, and Bartlett, as well as many others of great learning and experience. Contemporaries of that day agree with one accord that Judge Pitman even in that circle sustained a high rank in his profession, and that his personal character was above reproach. All who knew him concurred in the opinion that he was a lawyer of good judgment, high attainment, and much esteemed by the court. Actuated, however, by the attachments of early manhood, he accepted, in September, 1820, an invitation to return to his native city, where he has ever

since resided in the midst of the friends of his youth. President Monroe appointed him district attorney of the United States for this district on the 9th of December, 1820, and he continued to discharge the duties of that office with distinguished success until the 4th of August, 1824, when he was appointed district judge of the United States for this district. Forty years and more have elapsed since he entered upon the duties of that important office, and there lives not a man to say that he has been guilty of intentional error. Better things need no man have said of him than can be truly said of the subject of these remarks, that his whole course as district judge of the United States was such for the period of forty years that all knowing him agree that he was a good man and a just magistrate. Prior to my appointment to the bench of the Supreme Court, I had no personal acquaintance with my lamented associate. Since that time our relations have been intimate and cordial. Gone to the grave in the midst of a community where he was born, and where he has lived for the last forty years, he needs no commendation from any quarter. Justice, however, requires me to say that for the six years during which we have been associated together in this bench, I have always found him faithful to his duties, and anxious, in the decision of cases submitted to our determination, to reach the justice of the cause without the least bias, prejudice, or partiality. His example of purity and uprightness is a good one, which all may well seek to emulate, but which few or none can hope to excel.

Pursuant to the request contained in the resolutions, let the proceedings of the bar be placed upon the records of the court.

CHARGE IN WILLIAM H. JOHNSON *v.* JAMES E. ROOT.*

GENTLEMEN OF THE JURY : —

According to the uniform practice in this court, it now becomes my duty to direct your attention to the nature of the controversy between these parties as exhibited in the pleadings, and to give you such instructions in matters of law as seem to me to be applicable to the evidence in the case. You are the judges of the credibility of the witnesses and of the force and effect of the testimony ; and it is exclusively within your province, under the instructions of the court, to determine all questions of fact involved in the issue. But it is the province of the court to determine all questions of law, and it is your imperative duty in such matters to follow the instructions of the court. Unless the rule were so, it would never appear on what principles of law the jury proceeded in finding their verdict. Every verdict, in contemplation of law, is founded upon the facts of the case as ascertained by the jury, and the law applicable to that state of the case as determined by the court. Under our jurisprudence, the action of the jury in finding the facts cannot be revised in any appellate tribunal ; but very ample provision is made for the correction of any error committed by the court. Such correction may be accomplished in several modes, but the most effectual one is that by bill of exceptions and writ of error to the Supreme Court of the United States, to revise the rulings and instructions of the court below. That proceeding, however, is based upon the legal presumption that the jury followed the instructions of the circuit judge ; and that the error in the instructions of the circuit judge caused the error in the finding of the jury. Now, if it were competent for the jury to depart from the instructions of the court, then no such presumption would arise ; and if not, then it could not appear that the error in the instructions caused the error in the finding of the jury, and consequently it would be

* See report of case, p. 109.

unsafe to reverse the judgment on that account, which would leave the complaining party without any adequate remedy. Throughout your deliberations, therefore, you will be guided by the rule, that it is your province to ascertain the facts of the case, under the instructions of the court, and that it is the duty of the court to determine all questions of law applicable to the evidence. With these remarks I will proceed to direct your attention to the nature of the controversy.

This is an action of trespass on the case, for an alleged infringement of a supposed new and useful improvement in sewing-machines, secured to the plaintiff by certain letters-patent. Among other things, the plaintiff alleges that he was the original and first inventor of the improvement, and that letters-patent for the same were issued to him on the 7th of March, 1854. By recurring to the declaration, however, it will be observed that the letters-patent first issued were subsequently surrendered and cancelled, and that a new patent, on an amended specification issued to him on the 26th of February, 1856, to continue for the term of fourteen years, from the 7th of March, 1854 (which was the date of the original patent). The plaintiff also alleges that the defendant, on the 4th of March, 1856, and at divers other times, before and afterwards, during the term of the patent, and before the purchase of the writ, did unlawfully and wrongfully and without the consent and license of the plaintiff, make, use, and vend to others to be used, his said improvement.

Without further reference to the declaration, it will be sufficient to say that the suit is founded upon the reissued patent of the 26th of February, 1856, and that the writ is dated on the 28th of April of the same year. Of course, the plaintiff can only recover for such infringement of his patent, if any, as the evidence shows the defendant committed within the period embraced between those dates. But there is no controversy on that point, for it is admitted by the defendant that he sold the machine given in evidence by the plaintiff, as his machine, within that period, and it is not claimed by the plaintiff that the evidence shows that the defendant sold any other.

As an answer to the declaration, the defendant pleads that he is not guilty, and has filed certain written notices in the case,

setting up two general grounds of defence, to which more particular reference will hereafter be made. To maintain the issue on his part, the plaintiff, amongst other things, introduced the reissued letters-patent described in the declaration. That patent as reissued, bears date on the 26th of February, 1856, and is the one on which the suit is founded. At a later stage of the trial, the plaintiff introduced a model of the patented machine, as furnished to the Patent Office, which is the one constantly denominated during the trial as "the plaintiff's machine." His patent is accompanied by the specification and drawings, and you are instructed that it is *prima facie* evidence that the plaintiff is the original and first inventor of what he has described therein as his invention. Your attention, however, will be chiefly directed to the third claim in the specification, because it is that claim only which the plaintiff alleges that the defendant has infringed.

Omitting the first and second claim as comparatively unimportant in this investigation, it reads as follows : —

"What I claim as my invention and desire to secure by letters-patent is, 3d. The feeding of the material to be sewn by means of a vibrating piercing instrument, whether said instrument be the needle itself, or an independent instrument, in the immediate vicinity thereof, substantially as herein described."

The plaintiff also introduced the machine, which he alleges the defendant sold, and which he claims to be a violation of the exclusive right secured to the plaintiff by his reissued letters-patent, and the defendant admits that he sold that machine at the time and place alleged in the declaration, but he denies that the machine, as sold, infringes the third claim of the plaintiff's reissued patent; and he also denies that the plaintiff is the original and first inventor of anything that is embodied in his (the defendant's) machine.

These remarks will be sufficient to enable you to understand the foundation of the plaintiff's suit, and the two general grounds of defence set up by the defendant. Two principal questions are presented, which it is your province to determine from the evidence in the case under the instructions of the court, and you will adopt such order in considering them as you may think proper. But in view of the peculiar nature of the controversy,

and the complicated character of the evidence, it is not possible for me to give you a clear statement of the rules of law by which you are to be governed in the performance of your duty, except by pursuing the order of investigation usually adopted in cases of this description.

One of the questions is, whether the plaintiff is the original and first inventor of what he has described in the specification contained in his reissued letters-patent so far as respects the third claim of the patent; and the other is, whether the defendant's machine, as sold by him, and given in evidence by plaintiff, infringes that claim of the patent, when properly construed and understood according to its legal effect.

In considering those questions, and weighing the evidence bearing upon each of these points, it becomes necessary that you should know and carefully observe what the plaintiff's invention is, as he has described it in his patent, specification and drawings, so far as respects that claim. That question it is the duty of the court to determine as a question of law, arising upon the construction of the patent, including, of course, the specifications and drawings accompanying the same. Pursuant to that duty, I instruct you that the third claim of the plaintiff's patent is for his described means of feeding the cloth or other material to be sewed in a sewing-machine. Feeding the cloth or material to be sewed in a sewing-machine may be understood as signifying such a regular, progressive advance of the material as shall space the stitches of the seam regularly, so that they will be of equal length; and the third claim is for the described means to effect that end. It is not for the result attained, but for the means he has invented of attaining it substantially as described in the specification. Detached passages of the specification, if separately considered, might lead to a different conclusion, but the different parts of the instrument must be compared with each other and considered as a whole, and when so construed it leaves no doubt in the mind of the court that the claim must be limited to the means of feeding the material to be sewed in a sewing-machine, substantially as described in the specification and illustrated by the drawings.

It is insisted by the plaintiff that this part of his invention

consists in applying power by which the material is fed directly to the cloth or other material to be sewed, and at or near the point where the stitches are being formed ; and it is undoubtedly true that the feeding instrument in the modes of operation described in the specification, is to be applied directly to the material to be fed, and when the vibrating piercing instrument for feeding is the needle itself, it is applied to the material at the point where the stitch is being formed, for the specification states that the descent of the needle perforates the cloth and by the action of the described devices the pressure of the holder upon it is relieved, permitting the vibration of the needle to move forward the cloth, a sufficient distance for the succeeding perforation, the described spring acting through the holder as the needle-bar rises, so as to keep the cloth from slipping when the needle descends, and again perforates it. Beyond a question, therefore, the vibration of the needle during its first perforation, as stated in the specification, feeds forward the cloth and permits the needle in its second descent to have the proper position, and during the second descent of the needle, the cloth is fed forward as before, the needle making another hole, or again perforating the cloth as it again descends. These considerations lead necessarily to the conclusion that by the true construction of the patent the feeding action of the machine is performed by the operation of sewing ; the vibrating movement of the guide B, and with it the needle-bar, causing the material to be moved forward after it is perforated by the needle, the holder relaxing for that purpose.

Another feeding and perforating arrangement is also suggested in the specification, which as there stated is designed to be used for making the holes in leather and other heavy work, while the needle preceding the awl (as stated in the specification) forms the seam. And upon that subject you are instructed that when an independent instrument in the immediate vicinity of the needle, is used for feeding, it has the same mode of operation as the needle has when used separately in perforating the cloth for sewing, but the needle forms the seam. When an independent instrument in the immediate vicinity of the needle is used for feeding, it is applied directly to the material to be fed, and near

the point where the stitches are being formed. But whether the vibrating piercing instrument used be the needle, or an independent instrument in the immediate vicinity of the needle, the third claim of the plaintiff's patent is not for an abstract idea or principle; nor for every means of applying power directly to the cloth at or near the point where the stitches are being formed, for the purpose of feeding it in a sewing-machine, in contradistinction to applying power for that purpose to a plate, clamp, or bar, to which the cloth is attached. On the contrary, it is, as before stated, for such means of applying power to the cloth for the purpose of feeding it in a sewing-machine, as the inventor has substantially described in the specification of his patent.

For the same reason the claim of the patent under consideration is not for the use of every vibrating piercing instrument in feeding the material to be sewed in a sewing-machine, but only for such a vibrating piercing or perforating instrument as he has described in his specification, — nor is the claim for every use in feeding cloth of such a piercing instrument as he has therein described (for the instrument, to wit: the needle is old, and the plaintiff cannot without more, patent its use for feeding). He can only patent substantially such means or mode of using it as he has described in his specification; and such means or mode of using it as he has described in his specification, he might patent if he was the original and first inventor of the improvement: and by the true construction of the claim it must be limited to his described means of feeding the cloth in a sewing-machine. He describes his means in his specification, and then in legal effect claims the feeding of the cloth or material to be sewed by those means, — substantially, as described in his specification. Undoubtedly the vibrating piercing instrument, whether it be the needle itself or an independent instrument in the immediate vicinity of the needle, constitutes the described feeding instrument to move forward the cloth. It is contended by the plaintiff that those feeding instruments are different and distinct from the instruments or devices described by the patentee for holding the cloth or material to be sewed. They are certainly different from the devices constituting the holding arrangement: for the specification states in effect that the material to be sewed is placed upon the

table under the point of the needle, and cloth-holder, which is raised by a stud to admit the "thickness," and the claim is for the feeding of the material to be sewn by means of a vibrating piercing instrument substantially as herein described, evidently referring back to the specification. With this explanation you are instructed that there is included in the claim as part of the mode of operation, not only the vibrating piercing instrument substantially as described, but also whatever parts necessarily act in connection therewith to feed the material to be sewed in a sewing-machine, so far as any function they may perform modifies the action of the feeding instrument. Whatever means are described which are necessary to the control of the cloth to enable the vibrating piercing instrument to perform the function of feeding, and which modify the action of the feeding instrument, are, to the extent they modify it, to be considered and to be deemed parts of the described invention which the plaintiff has claimed.

In this connection you are also instructed that the feeding of the material claimed in the patent as the result to be attained by this part of his invention, is not to be understood to mean every advance of the material, regular or irregular, equal or unequal, but such regular and progressive advance as is essential to the useful action of a sewing-machine, and which the means described in the plaintiff's specification were designed and adapted to effect; and whatever parts in the plaintiff's specification necessarily act in connection with the vibrating piercing instrument in causing or enabling it thus regularly and progressively to advance the material, and without which the action of the vibrating piercing instrument either would not advance the material at all or would advance it so irregularly as to be useless in a sewing-machine, must be deemed essential parts included in the claim to the extent that they modify the action of the vibrating piercing instrument. No one probably would fail to see that in order to feed the material so as to obtain the described result, there must be a table or some equivalent mechanical device to keep the cloth in position, so that it will resist the thrust of the piercing instrument while it is making the perforation and after the pressure of the holder upon it is relieved to permit the needle as it vibrates to move forward the cloth a sufficient distance for the succeeding perforation.

For reasons equally obvious it may be assumed that the vertical bar or holder when held down upon the cloth by the spring, is quite necessary to the proper operation of the feeding arrangement, and upon this subject you are instructed that the surface below the material (called the table) which supports the cloth when it is pressed by the vertical bar or holder so as to keep the cloth from slipping as the needle descends and perforates it, and also the "cloth-holder," which exerts its pressure for that purpose, thus causing the material to be regularly spaced (the said means of supporting and holding the material being such that the same can be freely moved by the operator so as to change the direction of the seam at will as the same is advanced) are included in the claim as necessary to the plaintiff's mode of operation in feeding the material to be sewn, so far as the functions performed by them modify the action of the feeding instrument; but in no other respect can they be regarded as included in the feeding apparatus.

Guided by these principles as to the construction of the patent, you will proceed to the consideration of the merits of the controversy, and I shall direct your attention in the first place to the question whether the plaintiff was or was not the original and first inventor of what he has described in his specification as his invention so far as respects the third claim of the patent. Whether he was so or not is a question of fact for your determination under the instructions of the court. Your attention has already been drawn to the fact that the reissued letters-patent are in evidence in the case, but you should bear in mind in this connection that the plaintiff has also introduced the original letters-patent and the application on which the patent was granted. That application was filed on the 31st of March, 1853; and you are instructed that the reissued and original letters-patent, together with the application for the original patent, afford *prima facie* evidence that the plaintiff was the original and first inventor of the improvement in question at the date of the application for the original patent. That presumption, however, extends no further back than the date of that application, and is not a conclusive one, but may be controlled by other evidence. To administer justice to the parties it is necessary that

you should fully understand and carefully consider the precise positions which the parties respectively assume in this branch of the case.

It is insisted by the plaintiff that the feeding apparatus described by him in the specification of his reissued patent, and set forth in the third claim as the feeding of the material to be sewed by means of a vibrating piercing instrument, whether said instrument be the needle itself or an independent instrument in the immediate vicinity of the needle, substantially as described, was invented by him and reduced to practice in the form of an operative sewing-machine as early as the 27th of October, 1848, and that the same invention, so far as respects the means of feeding the material to be sewed in a sewing-machine, was subsequently embodied in his original letters-patent of the 7th of March, 1854, and is now embodied in the reissued letters-patent on which the present suit is founded. On the part of the defendant, every element of that proposition is denied. He denies that the plaintiff made the invention in question so far as respects the described feeding apparatus at so early a period, or at any other time prior to the date of the application for his original letters-patent; or if he did that he ever as matter of law or in fact reduced it to practice in the form of an operative sewing-machine, prior to the date of that application: and finally, he insists on this branch of the case, that what the plaintiff has embodied in the reissued patent is not the same invention as that described in the caveat, and embodied in the old red machine, but in point of fact is a substantially different invention, so far as respects the described feeding apparatus, and was designed and is adapted to effect the feeding of the material to be sewed in a sewing-machine by substantially different means and by a mode of operation substantially different. Whatever the plaintiff may have invented prior to his application for his patent, is of no consequence in this controversy, unless it appears that the same or some substantial and material part of the same which is new and useful is embodied in his reissued letters-patent, because it is for the infringement of that patent only that the defendant is sued in this case. When I speak of the patent, you will of course understand that I refer to the third claim of the

patent, because it is only that claim that the plaintiff charges the defendant with having infringed. It becomes necessary for you to inquire and determine what, if anything, the plaintiff did invent and reduce to practice in the form of an operative sewing-machine, so far as respects the feeding apparatus, prior to the date of his application for the patent ; and if anything, whether the same or a substantial and material part of the same is embodied in the reissued letters-patent, as construed and defined by the court. Although he invented a new and useful apparatus for feeding the material to be sewed in a sewing-machine, prior to the date of his application for his original patent, still, if no substantial and material part of the same which is new and useful is embodied in his reissued letters-patent, he cannot rightfully claim for the purposes of this suit, that his invention extends further back than the date of his application for the reissued patent. Differences merely in the form of the machinery or of the devices in the plaintiff's patented apparatus for feeding the material in a sewing-machine, as compared with that exhibited in the old red machine, will not authorize you to find that the former is a new invention as compared with the latter, even though the differences may amount to an improvement, if the old red machine in point of fact was an operative sewing-machine and reduced to practice as assumed by the plaintiff. But if the patented apparatus accomplished a substantially different result by substantially different means, and in a mode of operation substantially different, then there is nothing new and useful in common between the two machines. And if not, then the plaintiff cannot carry back the date of his patented invention to any period prior to the time he filed his application for the original patent. Among other things, it is suggested by the counsel of the plaintiff that the holder used in the old red machine, if the machine be tipped down on its side, will perform, for the purpose of feeding the material, both the function of the table and the presser foot ; and that in substance and effect, the old red machine becomes and is the same in principle and in the mode of operation as the patented machine, so far as respects his feeding apparatus. Four experts have been examined in the case, and no one I believe has testified that the machine as con-

structed was designed to operate in that position. Upon that subject I instruct you that if it would require invention to break up the machine and reconstruct it in that form, and put it into successful operation in that position, the suggestion of the plaintiff is entitled to no weight whatever; but if it would not require invention to make the proposed change in the position of the parts in order to make an operative sewing-machine, in that new position, and to reconstruct it for the purpose, then you will give the suggestion such weight as you may think it deserves, bearing in mind that the plaintiff himself has testified that it was never used in that way.

In this connection you will also take into consideration the S. C. Blodgett patent and machine, and all the evidence in the case respecting the same. On the part of the defendant, it is insisted that the Blodgett invention is prior in date to that of the plaintiff, even supposing that the plaintiff can carry back his invention to the time when he constructed the old red machine, and that the two machines, if the latter be turned down upon its side, are substantially the same. Every element of that proposition, however, is denied by the plaintiff, and evidence has been introduced on both sides bearing on the matter. Assuming the theory of the defendant to be correct, then the Blodgett machine would supersede the old red machine to the extent of the suggested change in the position of the working parts of the machine. Unless the witness Blodgett is mistaken, or unworthy of credit, it would seem that his invention was made before the old red machine was constructed by the plaintiff; but the question is one of fact, exclusively within your province, and as the question has been fully argued on both sides, I do not think it necessary to remark further upon the evidence. If the Blodgett invention was not made before the old red machine was constructed and reduced to practice in an operative machine, then the suggestion of the defendant is entitled to no weight; but if it was, then you will proceed to compare the two machines in connection with all the other evidence bearing upon the question, and give it such weight as you think it deserves. But suppose there is something in common between the old red machine and the patented machine of the plaintiff, still the defendant contends that the plain-

tiff cannot carry back the date of his invention to any period prior to the time he filed his application for the original patent.

To show that the feeding apparatus described in the specification of his reissued letters-patent was invented by him and reduced to practice in the form of an operative sewing-machine as early as the 27th of October, 1848, or certainly as early as the 7th of November of the same year, the plaintiff relies upon the old red machine, together with the parol testimony respecting the invention, and the caveat filed in the Patent Office, which is also in evidence in the case. Among other witnesses, the plaintiff himself was examined on the point. Reference will be made to certain portions of his testimony, not with any intention of entering into the details of the evidence, but for the purpose of fixing certain dates, and to present a general view of what the plaintiff did prior to his application for the original patent, which issued on the 7th of March, 1854. Irrespective of this statement (if in any respect it is incorrect), it will be your duty to weigh the whole evidence, and to apply the rules of law you receive from the court, to the true state of the fact as you find it from all the evidence in the case. He first constructed and used two needles to carry the thread, putting them into wooden handles, and sewing in the manner described by him in the early part of his testimony. Those wooden needle-holders, he stated, were made in June or July, 1847, and were occasionally used by him till some time in July of the following year. His first step towards constructing a sewing-machine was to prepare some patterns for needle bars, which was done in July, 1848. Needle bars were made from those patterns by his directions, and they are in evidence in the case. Afterwards he arranged them in a frame and got some gearings made, but they were not of a character to answer his purpose, as he stated, except as a basis of calculation for another set of patterns. Without entering into details, it will be sufficient to say that the frame as stated by the witness was a temporary one, and he did not attempt to sew in the machine. Having made his calculations, he constructed or caused to be constructed a new set of patterns and sketches, and employed a machinist to make another set of needle-holders and apparatus for a machine. They

were accordingly made in August, 1848, and the plaintiff, after they were completed, took them, together with the shafting and gearing which he had provided, to a cabinet-maker, and employed him to make the frame. That machine, had as the witness stated, what has been called a wooden holder, like the one first introduced by the plaintiff, and he says he did enough sewing with the machine to satisfy himself that it "was going to be a good practical thing." Something like a week or ten days elapsed before he did anything more to perfect the machinery. Intending to reconstruct the machine more thoroughly with a view to apply for a patent, he took the needle-holders out of the frame and carried them back to the machinist, in order to have another set made, with certain alterations and additions.

After the needle-holders were complete and the shafting and gearing had been somewhat improved, he then had a new frame made for his machine and put the whole in working order, using for that purpose the third set of needle-holders. As constructed, the machine had but one arrangement on the sides to receive a ratchet clamp. About the same time he also had a ratchet clamp made which he introduced in evidence; but as it was not completed and the arrangement to receive it was not finished, it could not be used. Certain other differences between this machine and the one previously constructed are also mentioned by the witness, which need not be recapitulated, as you will remember the whole testimony, and give it such weight as you may think it to deserve. Castings were also made by the plaintiff for a rotary clamp-holder, but they proved to be too heavy and were never finished, so that the only device to hold the cloth ever used by him before he went to Washington, was the holder (or one like it) which has been designated during the trial as the "wooden holder." Short pieces of canvas and padding were sewed, by the plaintiff, in the machine before he left for Washington, and the witness states that he sometimes sewed the length of the piece and then around the edge and back again in various forms. According to the statement of the witness, he commenced to construct the machinery, or the patterns for the same, in July, 1848, and put the last machine in working order a short time before he started for Washington. He

left for Washington on the 27th or 28th of October, 1848, carrying the machine with him as far as the city of New York. When he arrived at New York he found it necessary to forward the machine from there by the merchandise train, and it was somewhat injured on the route. In this connection you will recollect that he did not carry with him either the "wooden holder," which he had used in the machine before he started, or the castings for the rotary clamp; but he did carry with him the patterns by which the castings for the latter had been made. Avoiding unnecessary details as much as possible, it will be sufficient to say that after he arrived in Washington he employed a solicitor of patents, and soon learned that some parts of his invention had been anticipated by others, and that his model was too large and would not be received at the Patent Office on account of its size. He arrived in Washington several days before the machine came to hand; and during that period he constructed or caused to be constructed a rotary clamp. It was made of mahogany; and after the machine arrived, he repaired the machine and fitted in the rotary clamp for the first time. Up to that period of time he had never used any other than the stationary holder, because only one of the necessary arrangements for the ratchet clamp had been completed. After fitting the rotary clamp, he operated the machine in the presence of his patent solicitor. When he found that he could not patent his machine, he decided, under the advice of his solicitor of patents, to file a caveat, which is in evidence in the case. While he was there his solicitor also prepared a paper which has been given in evidence, and which the plaintiff in his testimony designated as a petition and oath for an application for a patent.

As stated by the plaintiff, it was signed and sworn to by him, and left with his solicitor, who, it seems, never presented it to the Patent Office during his lifetime, and it has remained among his papers until a recent period. On looking at the paper you will see that it contains no description of the invention or of its mode of operation, and is unaccompanied by any drawing, but what is more, it was never filed in the Patent Office, and, therefore, cannot be regarded as an application for a patent, within the meaning of the patent law. His caveat was duly exe-

cuted and filed on the 7th of November, 1848, and was accompanied by a drawing to illustrate the invention. Having executed those papers and filed the caveat, he took the machine out of the frame, put it in a trunk which he purchased for the purpose, and on the same afternoon left Washington to return to his home. All those parts of the machine remained in the trunk in his house at New Hartford until he removed to Granville, when he put them into a box, and with the exception of some few parts which he used on other machines, they remained in the box until the first part of January, 1853. During the period from the 7th of November, 1848, to the last of December, 1852, or the first part of January, 1853, he did nothing to perfect any needle-feed apparatus for feeding the material to be sewed in a sewing-machine. Taking his statement as true, he commenced soon after he returned from Washington to make the preparatory investigation to accomplish what is called the Grover & Baker stitch; and in November or December, 1848, he made a model. On the 17th of November, 1848, he wrote to his solicitor of patents the letter which has sometimes during the trial erroneously been designated as a second caveat. In that letter he stated, among other things, that "the needles cross each other and catch the thread from each needle, in the same manner as they do when both pass through the cloth, the object being to have all the looping on one side, and on the other side, leave but one thread, the same as in common back-stitching by hand. The only disadvantage (if it may be called a disadvantage) in this arrangement of the needles will be in the necessity of moving the wheel on which the work is placed by means of a feeder, as I had designed to move the bar, which is very easily done." Looking at the form of the paper, it is obvious that it is not a caveat, and by the true construction of the language employed it is equally clear that it was not designed as such by the writer. On the contrary, it is precisely what it purports to be, a letter from the plaintiff to his solicitor, and the filing of it in the Patent Office did not give it the force and effect of a caveat, within the meaning of the patent law.

Some time in January, 1849, if the court understood the witness correctly, the plaintiff sent a rough model of this invention

described in that letter to his patent solicitor in Washington, and he states that it remained there in the possession of his solicitor till October or November, 1852. Little or nothing was done by him after that towards constructing any model or machine, except to make some patterns, till June or July, 1852. He then went to Springfield and had some gearings, castings, shaftings, &c. made for a sewing-machine, and afterwards went to Granville, and employed one Joel Hall to help him make the machine. That machine was completed in September, 1852, and the plaintiff carried it to Washington in the course of the same month and filed an application in the Patent Office, with a view to patent the invention. You will bear in mind that this model was for the same invention substantially as that previously sent to his patent solicitor. Both parties concede that these were models of what is called the Grover and Baker stitch, and the rotary clamp.

Grover and Baker, on the 11th of February, 1851, had patented the same stitch, and had an application pending, or afterwards presented one for a reissue of their patent. An interference was declared by the Patent Office, and notice was given to Grover and Baker. Whereupon the witness Potter went to see the plaintiff to ascertain the nature of his claim, and, if possible, to adjust the controversy. They first met, as you will recollect, at Hartford, and there the plaintiff saw and examined the Grover and Baker machine. Failing to adjust the matter at that time, for reasons that need not be stated, they agreed upon a second interview; and accordingly they met at the office of Mr. Bates, in Westfield, in this State. Prior to these interviews the plaintiff had conveyed one half of the invention to Mr. Goodwin, so that it was necessary that he should be a party to the arrangement, if any should be made. At the first interview at Mr. Bates's office, they agreed upon a second interview at the same place, and accordingly it was had, and Mr. Goodwin was then present and became a party to the written agreement, which, together with the assignment and bond from the plaintiff to Goodwin, is in evidence in the case. After some two or three days' conference, the parties came to an understanding, which was reduced to writing, and the papers were

left in the hands of Mr. Bates. Pursuant to that agreement and the arrangement between the parties, the plaintiff's specification was divided, and the patent for the stitch, and perhaps the needles, was taken out in the name of Mr. Bates, and subsequently on the payment of the consideration agreed therefor, was assigned to Mr. Potter, who had acted throughout for the company, of which he was president. By virtue of that transaction, and of the assignment of the patent by Bates, which was subsequently made, the plaintiff parted with all his interest in so much of his invention as was included in the patent to Bates. That patent was granted on the 22d of February, 1853, and on the 12th of April in the same year, a patent was issued to the plaintiff, for the rotary clamp.

As the plaintiff states, he began to make some drawings for a needle-feed about the 3d of January, 1853. He had the frame to the old red machine made as now exhibited in the spring of 1853. It seems the cams have been changed, and I think the needles are not the same. Most of the machinery, as the witness states, is the same that was brought back from Washington in a trunk, and which had been kept either in the trunk or in a box, as before explained.

He had used the crank and one pulley in getting up one of the models he sent to Washington, and the rotary clamp is a new one; and, as I understand the testimony, the fly-wheel was used in another model. On cross-examination the witness stated that he completed the model for the needle-feed so as to take it out of the shop on the 17th of February, 1853. His application for a patent was filed on the 31st of March, of the same year, and on the 7th of March, 1854, the patent issued. To account for the delay from the 7th of November, 1848, when he started from Washington on his return home to the 3d of January, 1853, when he commenced to get up his model for the invention, originally patented on the 7th of March, 1854, the plaintiff has introduced testimony tending to show that during a part or all that time he was in poor health, and that he was somewhat embarrassed in his circumstances. On the other hand, the defendant has introduced testimony tending to show that his general health was not seriously impaired, and that his pecuniary circum-

stances were such that he was able to purchase a farm worth some \$ 1,500, and had nearly or quite the usual amount of stock on the farm.

Having referred in very general terms to what he did in relation to the machine which he carried to Washington, from the time he commenced to construct it to the time he filed his application for the original patent, I will proceed to state certain rules of law, by which you will be guided in this branch of the case, beginning with the caveat. Two provisions upon the subject of a caveat are to be found in the Patent Act of July 4, 1836. By the eighth section of that act, it is provided, among other things, that "whenever the applicant shall request it, the patent shall take date from the time of filing of the specification and drawings, not, however, exceeding six months prior to the actual issuing of the patent. And on like request, and the payment of the duty herein required by any applicant (which is \$30), his specification and drawings shall be filed in the secret archives of the office, until he shall furnish the model, and the patent be issued, not exceeding the term of one year, the applicant being entitled to notice of interfering applications." Reference is made to that provision simply for the purpose of remarking that the caveat in this case was not filed under that section, and I do not think it necessary to give you any instructions upon the subject. But there is another provision in the twelfth section of same act (and it is under that provision that the caveat in this case was filed). Omitting such parts of the section as have no application to this case, it provides in effect that any citizen of the United States who shall have invented any machine, or improvement thereof, and shall desire further time to mature the same, may, on paying to the credit of the treasury the sum of \$ 20, file in the Patent Office a caveat, setting forth the design and purpose thereof, and the principal and distinguishing characteristics, and praying protection of his right, till he shall have matured his invention; and such caveat shall be filed in the confidential archives of the office, and preserved in secrecy; and if application shall be made by any other person within one year from the time of filing such caveat, for any invention with which it may in any respect interfere, it shall be the duty of

the commissioner to deposit the description, specification, drawings, and model in the confidential archives of the office, and to give notice, by mail, to the person filing the caveat, of such application.

Nothing can be more certain than that the protection authorized to be secured by that act is limited to one year from the time of filing the caveat, and I instruct you that after the expiration of one year from the 7th of November, 1848, the caveat filed by the plaintiff in this case ceased to have any legal operation to protect his right, if any he had to his supposed invention. A caveat is allowed with a view to enable the caveator to mature his invention, and the act of Congress gives him one year for that purpose, and it is not competent for courts or juries, by virtue of such a proceeding, to enlarge or extend it any further.

It becomes my duty also to give you one other instruction upon this subject, based upon the circumstances of the case.

If you find from the evidence that the plaintiff did nothing to mature what he described or suggested in his caveat, his means of feeding the material to be sewed in a sewing-machine, from the 7th of November, 1848, to the last of December, 1852, then he cannot by virtue of the caveat carry back the date of his patented invention for feeding such material to any period before the date of his application for the original patent.

I am requested by the defendant to instruct you that the method of feeding claimed in the plaintiff's patent is not contained in his caveat, but I do not think it necessary to give that instruction, because there is no evidence in the case, as I understand it, to show that the plaintiff did anything to reconstruct his machine or to mature the needle-feed from the time when he filed his caveat until he commenced to construct the model for his patented machine; and if this is so, then you would not be authorized to give any effect to the caveat, as such, to carry back his invention described in the patent, to a period prior to the date of the application on which the patent was granted.

Irrespective of the caveat, it is insisted by the plaintiff that he may show and that the evidence in the case proves, that he invented the feeding apparatus described in the specification of his reissued letters-patent as early as the 27th of Oc-

tober, 1848, or certainly as early as the 7th of November of the same year, and that he reduced the same to practice in the form of an operative sewing-machine. That proposition is wholly denied by the defendant, and he insists: 1st. That the plaintiff did not make any such invention in 1848 as is described in the reissued letters-patent; 2d. If he did, that he did not reduce it to practice in the form of an operative sewing-machine. Whether he made such an invention as is described in the specification of his reissued letters-patent in 1848, and if he did, whether he reduced it to practice or not in the form of an operative sewing-machine, are questions of fact to be determined by you, from all the evidence in the case.

If you find that he did not make any such invention in 1848, or if he did, that he did not reduce it to practice in the form of an operative sewing-machine, then you are not authorized to find that his patented invention takes date prior to the time when he filed his application for the original patent, as it is not pretended that the model sent to the Patent Office in 1852 was an operative machine for practical use. Should you find for the plaintiff on both of the points under the preceding instruction, you will then proceed to examine the three patents of A. B. Wilson, with the drawings and models and machines made under the same, which are in evidence in the case. To avoid all danger of confusion, I will only refer to three patents.

One to A. B. Wilson was issued November 12, 1850, the application for which was filed March 18, 1850.

Another also to A. B. Wilson was issued August 12, 1851, the application for which was filed July 8, 1851.

The third was issued to Wheeler, Wilson, Warren, & Woodruff, assignees of A. B. Wilson, on the 15th June, 1852, the application having been filed on the 7th of February, 1852.

Certain other patents were also introduced by the defendant in the same connection, which he insists are substantially a continuation of the inventions described in the original patents issued to Wilson. For the present, however, I wish to direct your attention only to such as were issued to A. B. Wilson or his assignees prior to the application filed by the plaintiff for his original letters-patent. On this branch of the case you will inquire and deter-

mine from the whole evidence bearing upon the point, whether the feeding apparatus described in the Wilson patents, or either of them, or in the patented machines, or either of them, made under the patents, and given in evidence, are substantially the same or substantially different from the feeding apparatus, described in the plaintiff's specification in his reissued letters-patent. Whether Wilson's invention is substantially the same or substantially different from the plaintiff's patent is a question of fact for your determination, under the instructions of the court.

In determining that question you are not to determine about similarities or differences by the names of things, but are to look to the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that a thing is substantially the same as another, if it performs substantially the same function or office in the same way, to obtain the same result; and that things are substantially different when they perform different duties, or in a different way, or produce a different result. For the same reason you are not to judge about similarities or differences merely because things are apparently the same, or apparently different in shape or form, but the true test of similarity or difference in making the comparison, is the same in regard to shape or form as in regard to names, and in both cases you must look at the mode of operation, or the way the parts work, and at the result, as well as at the means by which the result is attained. In all your inquiries about the mode of operation of either machine, you are to inquire about and consider more particularly those portions of a given part which really do the work, so as not to attach too much importance to the other portions of the same part which are only used as a convenient method of constructing the entire part under consideration. You will regard the substantial equivalent of a thing as being the same as the thing itself, so that if two machines do the same work, in substantially the same way, and accomplish substantially the same result, they are the same; and so if parts of the two machines do the same work, in substantially the same way, and accomplish substantially the same result, those parts are the same, although they may differ in name, form, or shape; but in both cases, if the two

things perform different work, or in a way substantially different, or do not accomplish substantially the same result, then they are substantially different.

Slight differences in degree, if properly understood, cannot be regarded as of weight in determining a question of substantial similarity or substantial difference. One thing may be a little longer or a little shorter than another, or it may work a little better or a little worse, and yet the two things may be substantially the same. But that principle must be applied with great care where, as in this case, the devices are minute mechanism. Should you find that the inventions of Wilson, so far as respects the feeding apparatus, is not substantially the same as that described in the plaintiff's patent, then I instruct you that so far as respects the defence set up by the defendant under the Wilson patents, and those of a date subsequent to the plaintiff's application, the inquiry whether the plaintiff's invention takes date prior to the applications for his original patent, is wholly immaterial in this case, because Wilson's invention, if it be substantially different from the plaintiff's patent, cannot anticipate or supersede it.

But if you find that Wilson's invention, so far as regards the feeding apparatus described in the three patents under consideration, or in either of them, is substantially the same as the plaintiff's patented invention, you will then proceed to inquire, and determine from the evidence, when Wilson made his invention and reduced it to practice in the form of an operative machine, bearing in mind in respect to each of his patents in the case, that the patent (together with the application) is *prima facie* evidence that he was the original and first inventor of the improvement therein described, at the time when his application was filed in the Patent Office. You will also proceed to inquire and determine from the evidence, whether A. B. Wilson or his assigns did or did not construct machines under his first three patents, and sell the machines in the market for practical use, as sewing-machines, between the 8th of November, 1849, when the plaintiff's caveat ceased to have any legal effect for the protection of his right, and the 31st of March, 1853, when the application for his original patent was filed in the Patent Office.

A. B. Wilson, as he states, commenced to make a sewing-machine in February, 1849, at Pittsfield, in this State, and completed it about the 1st of April in the same year. When asked what he did with the machine, he stated that he sewed with it at various times, and made garments, and he afterwards gave the names of the persons for whom the garments were made. Several other witnesses testify that they knew he was at work getting up the sewing-machine, and saw it operated; and if the witnesses are to be believed, it sewed both straight and crooked seams, and sewed well. One witness, Lyman G. Burnell, testified that he made and assisted in making the needles and some of the screws for the machine, and another, W. D. Axtell, stated that after he had seen the machine operate he wrote a notice of it for publication. It appearing that the witness himself set the types at the printing-office, he was allowed to refer to the journal to refresh his recollection as to the time when he saw the machine and wrote the article for publication, and he states that he wrote the article and published it on the 18th of April, 1849. While living at Pittsfield, Wilson subsequently commenced a model of the machine, but he did not complete it until he changed his residence. In May, 1849, he went to North Adams in this State, carrying with him the machine and the model which was still unfinished, and while living there, he took the metallic parts of the machine off of the wooden plate on which the machinery was placed, and used some of the parts for other machines; but he still has in his possession or control the needle-arm and thread-spring. Something had been done to the model before he left Pittsfield, and he completed it as he states at North Adams, in the summer of 1851. After it was completed, he sent it to his patent solicitors in New York, but if I understood the witness correctly he afterwards procured it again from them, and it was used, at a certain trial, and he is not now able to state from his own knowledge where it is or whether it is in existence or not. He built another machine at North Adams in October, 1849, which as the witness states is fairly represented by the machine marked Z, given in evidence by the defendant, and called the "Adams brass-machine." Most of the metallic parts, as the witness states, are the identical ones which belonged to that ma-

chine, and in that statement appears to be confirmed in certain particulars by the statement of Joseph N. Chapin, Joseph H. Adams, Willard N. Ray, and perhaps by one or two other witnesses who saw it operate. Parts of the machine, as Wilson states, were used by him in building another machine, but he affirms that the residue are the same as those exhibited in what has been called the "Bright machine."

As I understood the witness, he next made one or two iron machines which were completed before he made the Patent Office model, but you will recollect his testimony for yourselves, as I shall not attempt to give the exact language of the witness. He made the Patent Office model also at North Adams in February, 1850, and he states that it was made like one of the iron machines. Pursuing the subject in the order of time, the next machine constructed by Wilson is the one he made for his wife. Passing over what he stated about his going to New York and Philadelphia and Washington, you will recollect his statement that he returned to North Adams on the 25th of April, 1850. He completed the model for the Patent Office a short time before he went to Washington, and on his return he commenced the machine called "Mrs. Wilson's machine," and completed it in July of the same year. According to his testimony it operated well, and he states that he used it for an exhibiting machine in North Adams, and that his wife afterwards used it as a family machine for making garments for himself and others. She used it as a family machine, as I understood the witness, after they went to New York in November or December, 1850. It was the first nipper-feed machine made by Wilson, and he states that his wife used it in Watertown after he went there to reside. He went there himself in February, 1851, but his wife did not return from New York until the following month. And he also states that she brought the machine with her to Watertown, and while there used it for making garments for himself and others, and continued to use it to do her sewing until he got the machines with the four-motions' feed. Inquiry was made of the witness whether the machine is now in the same condition as it was when his wife used it in November or December, 1850. To that inquiry he answered in effect that it had been for years in his garret

before he brought it to Boston for this trial and had become somewhat rusty, and that at the suggestion of Mr. Potter he had it cleaned up since he came here, but he states that there has not been any alteration in it other than cleaning it.

Joseph N. Chapin stated that this machine was finished in July, 1850 ; that he saw it operate in North Adams, and that it worked well ; and he also states that he saw it operate in other places ; that he saw Mrs. Wilson use it in making pantaloons, in New York, during the fall of 1850. It was also seen in North Adams by the witness, Joseph H. Adams, who states that he saw Wilson sew some pieces of cloth with it, and, as far as he could ascertain, it worked well. Chester F. Scott also states that he saw it at Watertown, in 1851, and saw Mrs. Wilson sewing with it, and he sewed with it himself at the office of the company. When asked what he saw Mrs. Wilson sew on it, he stated that it was a dress, or something of that kind, and he stated that it was a practical machine. Testimony has also been introduced by the plaintiff for the purpose of impairing the credit of A. B. Wilson as a witness. Ansel H. Barnum testifies that he worked for Warren, Wheeler, & Woodruff, during the fall of 1849, in the same shop where Wilson worked. He worked in three different rooms of the shop, and one of them (the upper one) was the room where Wilson worked, and the witness states that, although he was well acquainted with Mrs. Wilson, he never saw that machine, and he also states that Mrs. Wilson and Mrs. Cowan once came to the shop and got a nipper-feed machine, and one of them said that they were going to do some sewing. Charles R. Chult commenced to work in that shop on the 18th of March, 1851, and worked there about six months. He saw Mrs. Wilson occasionally, and was at her house, and never saw this machine, but he states that he had no opportunity to know whether or not she had it in her possession or use. William H. Hays commenced work there about the 20th of March, 1851, and worked there until the 12th of September, 1852. He says he never saw this machine, but he says he was not acquainted with Mrs. Wilson, and had little or no opportunity to see the machine. Frank Caffrey went into the employment of Warren, Wheeler, and Woodruff the 1st of April, 1851, and stayed there until the fall

of the same year; was sometimes in Mr. and Mrs. A. B. Wilson's room, and never saw this machine, or any other in her possession. Wilson worked for Ezra Ingraham in 1849. They had a conversation about the machine that Wilson commenced in Pittsfield, but they had no conversation about this machine. One of the experts called by the plaintiff, Mr. Hibbard, has expressed the opinion that this machine is one of very recent origin, and that he is unable to find in it such indications as he would expect to find, even if it had been used for one day.

Of course you will examine the machine, and weigh the opinion thus expressed, in connection with the positive testimony of Wilson, who states that he made it, and of the other witnesses who saw it at different places, and saw Mrs. Wilson using it, and of the person who operated it himself at the office of the company. Fraud is never to be presumed, and certainly not when the charge carries with it the imputation of an attempt to corrupt the fountains of justice by imposition and perjury; but the question is one of fact, and is entirely within your province. Warren, Wheeler, & Wilson constructed some five hundred of the nipper-feed machines under a contract, and Wilson states that the first one was made in February, 1851.

C. F. Scott sewed with all of these, except three or four, and he says they worked well; and the same witness says they continued to construct these machines till October or November, 1851. Seventy-five were made before the witness J. N. Chapin left in May, 1851. Nearly two hundred of the number, as the witness George H. Chittenden states, were sold at the office in New York City where he was employed to sell the nipper-feed machines from the latter part of the year 1850 to September or October, 1852, and he says they operated well for that time. Besides those sold in the office, he knew of the sale of one hundred and fifty more, in the latter part of the year 1852. Defendant's witnesses represent, I believe, that the whole of the contract machines were either sold or delivered from the manufactory after they were built. On the other hand, one of the plaintiff's witnesses states that some fifty or seventy-five of the contract machines were remaining in the factory when he left in 1852. These machines were what the defendant has designated as his

third form of feed, but the labels put on the machines are not evidence for your consideration. His third form of feed in the Wilson machine is what has been called the gun-barrel machine with the rotary hook. The witness Wilson commenced to build it in 1850, and completed it on the 5th of January, 1851. After that he commenced his fourth form of feed in May of the same year, but he did not apply for the patent till the 8th of July, and it was granted on the 12th of August of that year (1851). A. H. Burnham, one of the plaintiff's witnesses, states that in May or June, 1851, he saw a pocket machine which Wilson had of this description, and he says it was a completed machine and "did run." His fifth form was a four-motion feed with two teeth side by side feeding each side of the needle, but a feed with one tooth was soon substituted. Six machines with one tooth were made in the spring or early part of the summer of 1851, but all save one were soon altered to two teeth, one forward of the other. Both Scott and Wilson, I believe, state that the one-tooth machine fed goods tolerably well, but did not advance the material to be sewed with sufficient force. That patent was applied for on the 7th of February, 1852, and was issued on the 15th of June of the same year. The machine numbered nineteen is the next machine to which your attention is invited, which is called by the defendant the sixth form of feed. It has two teeth, one forward of the other, and is a four-motion feed. Two of the defendant's witnesses, Chester F. Scott and A. B. Wilson, state that it was made in the spring of 1851, shortly after the four-motion feed machine, with one tooth, and the former says that from one to two hundred machines of that description were made. He sewed with them all, and he states that they operated well, and that they were all taken from the shop, though he cannot say of his own knowledge that they were sold. When asked respecting the machine numbered twenty, which is also in the case, he said he first saw the machine in that exact form in 1851, remarking, however, in the same connection, that while the pattern was the same, the upper parts were different, that there was a difference in the pressure-foot, but adding that the pressure-foot was got up the last of the year 1851 or the first of 1852. Another witness for the defendant, G. R. Chittenden, stated that

the change in the pressure-foot from that numbered nineteen to that numbered twenty, was made, as he thinks, in July, 1852; and he also states that in the fall of 1851 he became familiar with the fact that machines with four-motion feed were being manufactured. They were introduced, one at a time at first, and so, perhaps, up to the middle of June, 1852. O. F. Winchester got his first machine in the latter part of 1851, and used it for a year on trial, and then got ten more. H. Griswold got three machines in the summer of 1852; and Joseph H. Murry states that some twenty-three hundred were manufactured with two points before they added more points to the feeding instrument. In this connection you will bear in mind that the patent of A. B. Wilson, of the 12th of November, 1850, has been re-issued. One of the reissued letters-patent is dated the 22d of January, 1856, and the other is dated the 19th of December, 1856. The patent to A. B. Wilson, of the 12th of August, 1852, was also reissued to the Wheeler and Wilson Manufacturing Company, as assignees of A. B. Wilson, on the 28th of February, 1860; and the patent granted to W. P. N. Fitzgerald, as assignee of A. B. Wilson, is the one under which the defendant alleges the machine sold by him was made and sold.

These several patents have been admitted as tending to show that the first three inventions of Wilson are still under the protection of subsisting patents, and that they have not become the property of the public. One of the objections taken to the admissibility of those which bear date subsequent to the date of the writ, was waived by the plaintiff, and, therefore, they were admitted, and are in evidence in the case.

The defendant has also introduced the patent to Grover and Baker, dated June 22, 1852, together with the disclaimer accompanying the same, which is dated the 11th of December, 1854. These last-mentioned patents, together with certain explanatory statements of the witness Potter respecting the same, were admitted as tending to show that the claim of Wilson to the four-motion feed in his application for his patent of June 15, 1852, was withdrawn by mistake on the part of Nathaniel Warren, as to the date of the invention, which had been made by Wilson. Whether the evidence admitted in the case is or is not sufficient

to satisfy you of that fact, is a matter for your determination ; and these last-named patents were also admitted as tending to show, in connection with certain conveyances and assignments, or licenses, that the interest in the Wilson inventions was passed to, and vested in, the Wheeler and Wilson Manufacturing Company, to the extent described in these conveyances, assignments, or licenses, given in evidence in the case.

Considering the course of the arguments on the one side and the other, it will be sufficient for me to refer to the title papers, without any further remarks upon the subject. They are as follows : —

Assignment of A. B. Wilson to Nathaniel Wheeler and Orlando B. Potter, dated February 1, 1856, conveying reissued patent No. 346, dated June 22, 1856.

Declaration of trust of patent No. 346, for the benefit of the Wheeler and Wilson Manufacturing Company and the Grover and Baker Sewing-Machine Company.

Assignment from Alanson Warren, George P. Woodruff, Nathaniel Wheeler, and A. B. Wilson to the Wheeler and Wilson Manufacturing Company of two letters-patent, one granted to them as assignees of Allen B. Wilson, and one assigned to them, but granted to Allen B. Wilson ; said letters-patent being No. 8,296, granted August 12, 1851 ; and No. 9,041, granted June 15, 1852, said assignment being dated October 5, 1853.

Assignment from William P. N. Fitzgerald to the Wheeler and Wilson Manufacturing Company of letters-patent, No. 12,116 ; dated December 19, 1854, granted to him as assignee of A. B. Wilson, assignment dated December 27, 1854.

License from W. O. Grover, William E. Baker, and O. B. Potter to Nathaniel Wheeler, A. B. Wilson, Alanson Warren, and George P. Woodruff, under patent, No. 9,053, granted to Grover and Baker, June 22, 1852, license dated July 1, 1852.

Should you find, under the preceding instructions, either that the plaintiff did not invent the needle-feed exhibited in the old red machine, and reduce the same to practice in the form of an operative machine in 1848, or if he did, that the patented invention of the plaintiff, described in the specification of his reissued patent, as construed by the court does not embody the same, or

a substantial and material part of the same, which was new and useful, or that the feeding apparatus described in the original Wilson patents is substantially different from the feeding apparatus described in the specification of the plaintiff's reissued letters-patent as thus construed, then you will have no occasion to consider the evidence on this branch of the case; for if the plaintiff did not make such an invention and reduce it to practice in the form of an operative machine in 1848, then he cannot carry back the date of his patented invention to any period prior to the time he filed his application for his original patent; and if the feeding apparatus described in each and every of the three original Wilson patents are substantially different from that of the plaintiff's patented invention, then the inquiry whether the plaintiff can or cannot carry back the date of his invention to a period before the application for his original patent was filed, is not involved in the issue between these parties, as it is not pretended by the defendant that the Blodgett machine is of a character to supersede the old red machine when the latter is used in the position in which it was evidently constructed and designed by the patentee to operate. On the other hand, if you find for the plaintiff on the first two points under the instructions of the court, but also find that one or all of the original Wilson patents, so far as respects the feeding apparatus therein described, and embodied in a practical machine or machines, is substantially the same as that of the plaintiff's patented invention, you will then proceed to the inquiries already suggested as arising out of the evidence on this branch of the case.

Although the plaintiff constructed a machine in 1848 (of which the old red machine is a true representation), and operated it in sewing pieces of canvas and padding, as stated in his testimony, and carried it to Washington and filed his caveat; still, it is insisted by the defendant that the plaintiff cannot, under all the circumstances of this case, carry back his invention to any period prior to the time when he commenced to make the model of his patented machine. Upon that subject, I instruct you, that if you find that the plaintiff invented the needle-feed, which is in the old red machine, in 1848, embodying the same in a machine of which the old red is a true representation (excluding the

rotary clamp), and operated it with the stationary holder, as he has described in his testimony, and carried it to Washington, leaving the stationary holder at home, and there constructed and fitted in the rotary clamp, and operated it there, as he has stated in his testimony; and on the 7th of November, 1848, filed his caveat in the Patent Office, still, if you also find that the plaintiff, on the same day that he filed the caveat, took the machinery out of its frame in Washington, and brought the parts home, leaving the frame there, and laid them aside as something incomplete and requiring more thought and experiment, before he restored the invention, in the form of an operative machine, although not with a definite intention of abandoning what he had accomplished, yet not with any determinate intention of resuming the same, but really for the purpose of preserving the parts, to be used by him or not as he might thereafter determine, and suffered his caveat to expire, and did nothing to restore the invention in the form of an operative machine, or to mature the needle-feed from the time he left Washington to the last of December, 1852, when he commenced to make a model with a view to apply for his patent, and, in the mean time, A. B. Wilson, without knowledge of what the plaintiff had accomplished, invented the same thing, and reduced the same to practice in the form of an operative machine, filed his application for a patent after the plaintiff's caveat had expired, and then obtained letters-patent for the same, and that A. B. Wilson, or his assigns, manufactured machines under that patent for practical use as sewing-machines, containing the same feed, and that the machines so manufactured were sold in the market, and went into practical use before the plaintiff commenced to restore his invention, or to make his model with a view of obtaining his original patent; then I instruct you that if the defendant's machine was made under the Wilson patent, and the defendant sold the same by the authority of Wilson or his assigns, the plaintiff cannot carry back his invention to any period prior to the time he commenced to make the model for his original patent, provided you also find that the Wilson patent embodies the same needle-feed as that of the plaintiff's patented invention.

All three of the patents granted to Wilson, namely, the patent.

of the 12th of November, 1850, the patent of the 12th of August, 1851, and the patent of the 15th of June, 1852, were issued prior to the plaintiff's application for his original patent; but you must apply the preceding instruction to each of these patents, and to the machines made under them separately, each being considered separately from the others, because the instruction embraces several elements, all of which must concur if you find for the defendant.

If you find for the defendant under the preceding instruction, as explained, then, the plaintiff cannot carry back his invention to any period prior to the time he filed his application for his original patent, and your verdict should be for the defendant. But if, under that instruction and all the instructions which preceded it, you shall find for the plaintiff, then you will proceed to the consideration of another ground of defence set up by the defendant on this branch of the case.

Suppose the plaintiff did invent the needle-feed embodied in the old red machine in 1848, and reduced the same to practice in that form, to the extent stated in his evidence, still, it is insisted by the defendant that he afterwards deserted and abandoned what he then accomplished, and having wholly neglected to do anything to restore the machine or to mature any needle-feed in a sewing-machine, from the 7th of November, 1848, to the last of December, 1852, or the 1st of January, 1853, he cannot, under the circumstances of this case, carry back his invention to any period prior to the time of his application for the original patent, or certainly, not to any period prior to the time when he commenced to make his model for the Patent Office.

Whether the plaintiff deserted and abandoned what he had accomplished, so far as the needle-feed is embodied in the old red machine, is a question of fact for your determination from all the evidence in the case, under the instructions of the court. If you find that the plaintiff, after having taken the machinery out of the frame in Washington and brought it home, leaving the frame there, laid the machinery aside as something incomplete and requiring more thought and experiment, and never intending to reconstruct the machine or to restore the needle-feed in the form of an operative sewing-machine, without mate-

rial modifications or alterations, but only to preserve the parts to be used in other inventions as circumstances might arise, then I instruct you that you would be fully warranted in finding that he deserted and abandoned the invention so far as respects the needle-feed, provided you also find that he did nothing to restore the needle-feed in the form of an operative machine from the 7th of November, 1848, to the last of December, 1852, or the 1st of January, 1853. On the other hand, if you find from the evidence, that the invention, so far as relates to the feeding apparatus, was completed and had been reduced to practice in the form of an operative machine, and the parts were boxed up after he returned from Washington, and laid aside without any intention of abandoning the invention, but with the intention of constructing a new frame and restoring the invention in the form of an operative machine, which should include the needle-feed, and of applying for a patent, and the neglect and delay to resume the undertaking and carry such intention into effect is fairly and reasonably accounted for by the evidence in the case, then you are not authorized to find that the plaintiff deserted or abandoned what he had then invented and reduced to practice in the form of an operative machine. Whatever evidence there is in the case to account for the long delay to resume the undertaking and restore the invention in the form of an operative machine, and take the necessary steps to apply for a patent, is for your consideration ; but I am not aware of any except the testimony introduced as to the state of his health and the condition of his pecuniary affairs, and that testimony is somewhat conflicting. While I cannot say as a matter of law, that this testimony is wholly irrelevant or immaterial (and therefore it is for your consideration), still I regard it as my duty to say that I think it is entitled to very little weight. Where an inventor has completed his invention and reduced it to practice in the form of an operative machine, and while in the exercise of reasonable vigilance to construct his model with a view to apply for a patent, he should be arrested in his efforts either by sickness or want of means to carry out his intentions, such evidence would deserve much consideration in a question like the present ; and the suggestion would apply with equal, if not greater force, in the case

of an individual who was using his best endeavors to mature and complete what he had really conceived, but had not fully reduced to practice in the form of an operative sewing-machine. Nothing of that kind, however, is suggested in this case, and obviously for the reason that the plaintiff cannot carry back the date of his invention to any period prior to his application for his reissued patent unless it appears that his invention was completed and reduced to practice in the form of an operative machine. In determining the questions arising under the last three instructions, you will also take into consideration all that occurred at Washington at the time he constructed the rotary clamp and filed the caveat, also the fact stated by himself, that he took the machinery out of the frame, leaving the frame there, and that he laid the parts aside in his trunk after he returned home, and when he moved to Granville that he boxed them up, suffering his caveat to expire, and did nothing to reconstruct his machine or to restore the needle-feed in the form of an operative machine until the last of December, 1852, or the 1st of January, 1853. You will also take into consideration all the evidence tending to show that while he did nothing to restore his machine to a condition which would enable him to apply for a patent, that he gave his time and attention (or a part of the same) to the completion of another invention embodying a different instrumentality for feeding. And you will also take into consideration the testimony of the witness Potter, as to what occurred at Hartford when he examined the Grover and Baker machine, and also the testimony of Mr. Bates as to what occurred in the interviews between Mr. Potter and the plaintiff at his office. If you find that the plaintiff deserted and abandoned what he had accomplished in the old red machine, and that Wilson in the mean time invented the same thing and reduced his invention to practice in the form of an operative machine and took out his patent, then the plaintiff cannot carry back his patented invention to any period prior to the application for his original patent, and your verdict should be for the defendant.

After a careful consideration of the evidence, however, if you should find for the plaintiff under each of the preceding instructions, then you will proceed to the second general ground of defence set up by the defendant.

The charge in the declaration in effect is, that the defendant's machine infringes the plaintiff's reissued letters-patent; and that is a question which you are to determine from all the evidence in the case, under the instructions of the court. But unless you find that the plaintiff is the original and first inventor of the needle-feed described in the specification of his reissued letters-patent, you will have no occasion to consider the question of infringement.

On the question of infringement, the burden of proof is on the plaintiff to show to your satisfaction that the defendant's machine (which it is admitted he sold as the agent of the Wheeler and Wilson Manufacturing Company) does infringe the third claim of the plaintiff's reissued patent, as construed and defined by the court. Whether the defendant's machine does infringe that claim or not, is a question of fact for your determination from all the evidence in the case, under the instructions of the court. Instructions have already been given you on another branch of the case, prescribing certain general rules of law by which you are to be governed in comparing one machine or device with another, to enable you to determine whether, in legal contemplation, the two machines or devices are substantially the same or substantially different; and those instructions are equally applicable to the present question in respect to the defendant's machine and the plaintiff's patented invention. But considering the nature of this inquiry, I think it necessary to give you some more specific instructions by which you will be governed in applying those general rules of law to the question under consideration. In determining that question you will find it necessary to keep constantly in view the instructions of the court as to the construction of the plaintiff's patent, else you will be liable to fall into error. By the true construction of the plaintiff's patent, the third claim is for his described means of feeding the cloth or other material to be sewed in a sewing-machine. What those means are, the instructions already given will enable you to understand with clearness and certainty, and if the defendant in his machine uses substantially the same means of feeding, in a way substantially the same, and they accomplish substantially the same result, then I instruct you

that the defendant's machine infringes the plaintiff's patent, and your verdict should be for the plaintiff. But if you find that the defendant in his machine used substantially different means, or the means do substantially different work, and in a way and mode of operation substantially different, then I instruct you that the defendant's machine does not infringe the third claim of the plaintiff's patent, although it accomplishes substantially the same result, and your verdict should be for the defendant. His patent is not for a result, but for the means as substantially described in his specification for accomplishing that result, and to guard against mistake, I repeat that the claim is not for every means of applying power directly to the cloth, at or near the point where the stitches are being formed, for the purpose of feeding it in a sewing-machine in contradistinction to applying the power for that purpose to a plate, clamp, or bar; because if it were so, it would be a patent for an abstract idea or principle, and therefore would be invalid, but it is for such means of applying power to the cloth for the purpose of feeding it in a sewing-machine, as the plaintiff has substantially described in the specification of his reissued letters-patent, and if the defendant in his machine uses substantially the same means to accomplish that purpose, in substantially the same way, then his machine infringes the plaintiff's patent; but if the defendant in his machine uses substantially different means for that purpose, or the means do substantially different work, and in a way and mode of operation substantially different, then the machine does not infringe the plaintiff's patent. Applying the same rule of interpretation to the claim of his patent in another aspect, and it is obvious that the claim is not for the use of every vibrating piercing instrument in feeding material to be sewed in a sewing-machine, because no one can patent motion merely as contradistinguished from the means by which the motion is effected. But it is necessary to go further, and consider the subject in still another aspect. No one can patent an instrument which is old within the meaning of the patent law; and it is conceded that the needle and the awl described in the specification of the plaintiff's patent are old, and consequently it follows that the claim of the patent is not for every use of these instruments in feeding the cloth to be

sewed in a sewing-machine, because these respective instruments, being old within the meaning of the patent law, the plaintiff could not, without more, patent them. He could only patent such means or mode of using them as he has substantially described in the specification of his reissued patent ; and if the defendant in his machine uses substantially the same means, and in substantially the same way, to accomplish substantially the same result, then his machine infringes the third claim of the plaintiff's patent ; but if the defendant in his machine uses substantially different means, or in a way or mode of operation substantially different, then his machine does not infringe the third claim of the plaintiff's patent. In determining whether the means and mode of operation in the plaintiff's patented invention are substantially the same or substantially different from those in the defendant's machine, you must bear in mind the instructions of the court already given, that there are included in the third claim of the plaintiff's patent, as part of the mode of operation, not only the vibrating piercing instrument, but also whatever parts necessarily act in connection therewith to feed the material to be sewed in a sewing-machine, so far as any function they perform modifies the action of the feeding instrument, and consequently whatever means are therein described which are necessary to the control of the cloth, to enable the vibrating piercing instrument to perform the function of feeding, and which modify the action of the feeding instrument, to the extent they modify it, are to be deemed parts of his described invention which the plaintiff has claimed ; and the same remarks with the same qualifications, apply to the surface below the material to be sewed (called the table) which supports the cloth when it is pressed by the vertical bar or holder, so as to keep the cloth from slipping as the needle descends and perforates it ; and also to the cloth-holder which exerts its pressure for that purpose, as more fully explained in the instructions already given.

For the purposes of this trial you will take it to be law, that the instructions given to you upon this subject are correct. No matter if different opinions may have been expressed by the witnesses or by counsel. Trial by jury, though an inestimable right, is not a trial without a court, and is not so regarded in the Con-

stitution of the United States or the laws of Congress. Matters of fact belong exclusively to the jury, but the court must determine questions of law, subject to exceptions, else it would fail to perform its duty and the law of the case could never be revised. Sometimes the court in trials at this description invites the attention of the jury to the characteristics of the invention and patented machine of the plaintiff and the machine of the defendant, and also attempts to classify the evidence introduced in the case on the one side and the other, but that duty has been performed with so much thoroughness by the counsel of the parties, that the court will omit it on the present occasion.

Witnesses, as a general rule, are required to testify to facts only, and are not allowed to give their opinions, but where the question at issue relates to a particular art, science, or profession, persons possessing peculiar qualifications, and skilled in that particular art, science, or profession are uniformly regarded as exceptions. Such witnesses are usually denominated experts, and their opinions are admissible in the case for the court and for the jury.

Two witnesses on each side have been examined as experts in this case, and in the course of the examination, the characteristics of all the machines given in evidence have been pointed out by them and explained. It would be difficult, if not impossible, for the court to add anything by way of explanation, without repeating what has already been several times rehearsed. Like all other evidence in the case, the opinions of the experts are for your consideration, and it is a matter within your province to determine what weight you will give to their testimony.

Much time has been spent in this trial, and it is very desirable that the controversy should now be settled upon correct principles of law, and the evidence in the case. Both parties appear to regard the matter in dispute as one of great importance, and I think you ought to give it a very deliberate consideration and use your best endeavors to agree upon a verdict.

Should you find for the defendant, under the instructions of the court, you will have no occasion to consider the question of damages; and, if I understand the views of the plaintiff, in case of your finding in his favor, he only claims nominal damages,

and he can recover compensation for the sale of one machine only. Under the circumstances of the case, I do not think it necessary to remark further on this subject, except to say that in general the claim for damages in cases of this description is no test of the importance of the controversy. Parties coming into this court, as in all other similar tribunals, have a right to expect that justice will be administered according to law and the evidence, and it is the duty, both of the court and jury, to fulfil their just expectations in this behalf.



INDEX.

ABANDONMENT.

1. Desertion of an invention, consisting of a machine never patented, may be proved by showing that the inventor, after he had constructed it and before he had reduced it to practice, broke it up as something requiring more thought and experiment, and laid the parts aside as incomplete, provided it appears that those acts were done without any definite intention of resuming his experiments and of restoring the machine with a view to apply for letters-patent. *Johnson v. Root*, 108.
2. If a person employed in inventing, from discouragement or dissatisfaction, breaks up what he has accomplished, and lays the parts aside, not wholly intending to abandon the subject, but wholly uncertain whether he will ever resume it, and without any controlling impediment in the way of an application for a patent, and another in the mean time, without any knowledge of that which was so suspended, invents the same things, reduces it to practice, takes out his patent, and introduces his patented invention into public use, the latter must be regarded as the original and first inventor. *White v. Allen*, 224.
3. But where some of the parts used in an inventor's experiments upon an improvement were preserved by him, and finally embodied in his Patent Office model, and where the evidence indicated that he only intended to postpone his application for a patent until certain objections to his making an application, not however relating to the completeness of his invention, ceased to exist, it was *held*, that the invention had not been abandoned. *Ibid*.
4. The defence of abandonment, and acquiescence in the manufacture and sale of the invention by the complainant, cannot be sustained without proof of knowledge on the part of the complainant of such use and sale, nor has the respondent, without proof of such knowledge by the complainant, any grounds to believe that the manufacture and sale of complainant's invention would not by him be deemed an infringement. *Howe v. Williams*, 245.
5. If the complainant, in his original patent, fails to make claim for a certain portion of his invention described in the specification, he cannot, under such original patent, maintain suit against any person for the use of such portion or device, but he may reissue and correct the deficiency, and then enforce his right to such omitted portion.
6. An inventor, at the time of making his discovery, intended to apply for

letters-patent thereon; but having been incorrectly advised that his invention was anticipated by a patent of prior date, he kept his improvement a secret, practising it for his own benefit; and when aware that he had been misinformed, he filed his application without unnecessary delay. *Held*, that he had not so postponed his application for a patent, and concealed his invention, as to forfeit his right to the grant of a patent. *Ayling v. Hull*, 494.

7. An application for a patent was first made in 1855, and rejected, on appeal to the commissioner, in 1856. No further appeal or new application was made till March 25, 1864, when a second application was made, which was successful. Between 1856 and 1864 the invention had gone into public use with the inventor's knowledge and consent, as shown in the testimony, and the inventor had made certain assignments and sales of interests in the invention. *Held*, that these facts did not show actual abandonment. *Dental Vulcanite Co. v. Wetherbee*, 555.
8. Delays in the Patent Office, which the inventor cannot prevent, should not under any circumstances affect the validity of his patent when granted *Ibid*.

See PATENT, 3.

ABATEMENT.

See PRACTICE, 13.

ACQUIESCENCE.

See ABANDONMENT, 4.

AD VALOREM DUTY.

See APPRAISER, 2.

ANSWER.

1. Where the allegations of the answer are directly responsive to the bill, courts of equity cannot decree against such denials of the respondents, on the testimony of a single witness. *Tobey v. Leonard*, 40.
2. The rule is universal that the complainant in such a case must have two witnesses, or one witness and corroborative circumstances, or he is not entitled to relief. *Ibid*.
3. The complainant, calling upon the respondent to answer an allegation, admits the answer to be evidence; and if it is testimony, it is equal to the testimony of any other witness. *Ibid*.

See EVIDENCE, 3; PRACTICE, 21.

APPEAL.

A party not appealing from the decision of the District Court can, in this court, only be heard in support of the decree of the court below. *Busk v. Schooner Alonzo*, 548.

APPRAISER.

1. The determination of appraisers under the fifth section of the act of the 5th of March, 1823, as to the true and actual market value and wholesale price of an importation, in the principal markets of the country from which it was exported, is conclusive in the premises. *Bailey v. Goodrich*, 597.
2. But these duties of the appraisers are by the first section of the act of March 3, 1851, limited to goods, wares, and merchandise subject to *ad valorem* duty. *Ibid.*
3. Values of imported goods subject to specific duty are by section 8 of the act of February 10, 1820, ascertained in the same manner as those of goods subject to *ad valorem* duty, but the requirement is for statistical purposes, different from those described in the acts of Congress making provision for the appraisement of articles subject to *ad valorem* duty. *Ibid.*
4. In the appraisement of goods subject to specific duty, the decision of the appraisers is not conclusive as in the case of goods subject to *ad valorem* duty. *Ibid.*

ASSIGNMENT.

1. The entire interest in a patent was assigned by the inventor, and subsequent to such assignment an application for reissue was signed by and the reissue granted to him. *Held*, that in the absence of fraud or concealment it could not be said that the reissue was void, the assignment being duly recorded in the Patent Office, and the surrender having been made with the knowledge and consent of the assignee. *Dental Vulcanite Co. v. Wetherbee*, 555.
2. Under such circumstances a mere wrongdoer cannot defend himself against the charge of infringement by proving that the proceedings which led to the reissue were irregular, unless it be shown that the proceedings were contrary to law, or that the patent was granted to the wrong party. *Ibid.*
3. In case of an assignment by a debtor, with preference of certain creditors, *held*, that where the proceeding was under the law of a State, such law must furnish the rule of decision for the Circuit Court sitting in the State. *Parker v. Phetteplace*, 70.
4. Assignments with preferences to certain creditors being held valid by the courts of Rhode Island, the Circuit Court sitting in that State will follow that rule as to all such assignments under the State law.

BEQUEST.

1. A testatrix, after certain minor bequests, devised all the rest, residue, and remainder of her property to two trustees, or the survivor of them, their heirs and assigns forever, to hold, manage, and invest the same according to their best discretion, and to pay over the net income to her three children in equal shares. Upon the decease of any one of the children, the share which such one would have taken, if alive, was to be divided between the surviving two; upon the decease of two of them, the survivor to have one half of the whole income during such survivor's life. Upon the decease of all the children, the

trustees, or their successors, were to appoint three gentlemen to determine how, by payments to permanently established incorporated charitable institutions, the whole property might be disposed of for the benefit of the poor. After the decease of the three donees under the will, — two without issue, — the children of the other, which children were born before the will was made, as the sole heirs at law of the testatrix, brought a bill against the survivor of the trustees (when the provisions of the will relating to charitable institutions were about to be carried into effect by said trustee), praying for an account, and a decree that said trustee should transfer the property to the complainants, and alleging the trusts to be illegal and void; that they could not be executed; that they had ceased and determined; and that the intention of the testatrix to bestow the property upon charitable institutions was never perfected. *Held*, that the case showed no unintentional and accidental omission of the complainants in the will, which is requisite under the Massachusetts statute of wills, as construed by the courts of that State, to constitute the foundation of the relief prayed for, and that complainants were not entitled to a decree. *Held*, also, that the power conferred upon the trustees to appoint a committee who should designate the disposition to be made of the property, after the death of all the testatrix's children, was one coupled with an interest which could be exercised by the surviving trustee, and not a mere naked power to two, which could not be exercised by one of them. *Held*, also, that it appeared that the intention of the testatrix to give the property for the benefit of the poor, had been legally carried into effect. *Loring v. Marsh*, 469.

2. Review of the decisions of the Supreme Court of Massachusetts upon the 25th section of the State statute of wills. Children are omitted in the will, in the sense of this statute, when no legacy is given them, and they are in no manner mentioned; grandchildren, where it appears that their father died before the execution of the will, stand in the same position; and posthumous children fall within the same category, because they are within the express words of the colonial statute of May, 1718, as well as under the decision of the State courts, children born after the date of the will and before the death of the testator. *Ibid*.

BONDED WAREHOUSE.

See COLLECTOR, 11, 12, 13.

BURDEN OF PROOF.

See ABANDONMENT, 4; DEFENCE, 4; PATENT, 18; PLEADING, 4.

CAPTURE.

See INSURANCE, 8, 9.

CAVEAT.

See CONSTRUCTION, 3, 4.

CERTIFICATE.

See COLLECTOR, 14 - 16.

CHARGE.

See EXCEPTIONS, 1, 7.

CHARTER-PARTY.

1. Under the terms of the charter-party in this case, the owner of the ship has a lien on the cargo for the payment of the freight. *Kimball v. Ship Anna Kimball and Cargo*, 4.
2. The effect of this is not changed where the charter-party stipulates that the balance of the charter was payable one half in five days and one half in ten days after discharge of homeward cargo. *Ibid.*
3. Charter-parties may be so framed as to defeat the implication of a lien on the cargo for the freight. *Ibid.*
4. But it is necessary to examine the whole instrument, and to compare the parts invoked to defeat the lien, with all the other parts. *Ibid.*
5. A vessel, while on a voyage to Melbourne, was chartered by the managing owners to defendants, for a voyage from Calcutta to a port in the United States. The charter-party contained a clause that the vessel was to "proceed from Melbourne to Calcutta with all possible despatch." *Bangs v. Lowber*, 157.
6. Before the master was advised of this engagement, the vessel had sailed from Melbourne to Manilla, seeking business, and did not arrive at Calcutta as soon as the parties had contemplated. The defendants refused to load the vessel; and upon suit to recover damages for a breach of the charter-party, brought by the managing owners, who were described therein as "owners" of the vessel, it was *held*, that although there were other owners, the suit was rightly brought in the names of those subscribing the charter-party in good faith. *Ibid.*
7. It was also *held*, that the clause quoted above was not a condition precedent, but an independent stipulation, which gave the charterers a claim for damages, on failure of performance by the owners, but did not give them the right to avoid the contract, because it appeared that the object of the voyage was not wholly frustrated thereby. *Ibid.*

See DAMAGES, 1, 2.

COLLECTOR.

1. Provision for commissions and allowances to collectors of customs was first made by the act of the 31st of July, 1789. *United States v. Macdonald*, 27.
2. New regulations were instituted by the acts of the 18th of February, 1793, 2d of March, 1799, and by the Compensation Act. *Ibid.*
3. A maximum rate of compensation was first prescribed by the act of the 30th of April, 1802. *Ibid.*
4. By the act of the 7th of May, 1822, collection districts were divided into two classes, viz. the enumerated and non-enumerated ports. *Ibid.*

5. The emoluments of collectors of the non-enumerated ports might reach the sum of four thousand dollars; but the collector, after deducting the necessary expenses incident to his office, was required to pay any excess over that sum into the treasury of the United States. *Ibid.*
6. The maximum rate of compensation allowed to collectors of the non-enumerated ports was three thousand dollars, and a similar provision relating to any excess over that sum was made, as in the first-named class. *Ibid.*
7. By the act of the 3d of March, 1841, collectors were required to include in their quarter-yearly accounts all sums received by them for storage of goods in the public storehouses for which a rent was paid beyond the rents paid by the collectors. *Ibid.*
8. In *United States v. Walker*, 22 How. 313, the conclusion of the court is, that the compensation of a collector of one of the enumerated ports may be six thousand dollars, and of the other class five thousand. *Ibid.*
9. Collectors are charged with the custody and control of all merchandise warehoused under the laws of the United States, and it is their duty to demand and receive of the importer the appropriate expenses of such custody and control. *Ibid.*
10. The sums thus demanded and received by collectors are storage within the meaning of the act of the 3d of March, 1841, whether the goods were deposited in stores leased by the United States, or other storehouses. *Ibid.*
11. Whether deposited in public or other storehouses, the goods were to be kept under the joint locks of the inspector and importer, and such storehouse then became a public storehouse for the purpose of securing goods under the warehouse system. *Ibid.*
12. Under the act of March 3, 1841, as well as by all the subsequent acts of Congress upon the same subject, private bonded warehouses are public storehouses, and collectors are authorized to retain, as part of their emoluments, sums received for the deposit of importations in such bonded warehouses, under the same provisions applicable to public storehouses. *Ibid.*
13. When deposit of merchandise was made in public or private stores, appropriate expenses were to be paid by the party making the deposit; and the whole proceedings show that the goods in both cases alike were regarded as warehoused in the public stores of the United States. *Ibid.*
14. The treasury circular of the 13th of July, 1795, allowed to the supervisors of the revenue, for preparing, stamping, and distributing among the inspectors the sum of one cent for every certificate to accompany foreign and domestic distilled spirits, wines, or teas, which should be actually issued in the ports of their respective districts. *United States v. Austin*, 325.
15. When the revenue act of March 2, 1799, was passed, it became necessary to issue a new circular upon the subject, because the whole duty of providing such blank certificates was therein imposed upon the supervisors of the several districts. *Ibid.*
16. Such supervisors were, by the new circular, allowed one cent for every certificate prepared, stamped, and distributed, and the addition of one cent

- for numbering and signing every certificate which was actually issued in the ports comprehended within their respective districts. *Ibid.*
17. By the act of the 6th of April, 1802, the duty of preparing and furnishing such certificates was transferred to collectors, and in the same act it was provided that they should receive the same compensation therefor as that before allowed to supervisors. *Ibid.*
 18. This duty is one directly connected with the office held by the collector, and he cannot be entitled to a greater amount from that source than the sum of \$400, which is the maximum allowed by law to collectors for extra services having an affinity or connection with the duties of said office. *Ibid.*
 19. The act of the 12th of June, 1858, directed that collectors of customs should act as disbursing agents of money appropriated for the erection of marine hospitals, and with such compensation, not exceeding one fourth of one per cent, as the Secretary of the Treasury should deem equitable; but any sums charged by a collector on money disbursed for such purpose before the passage of the act, falls within the prohibition of the act of the 23d of August, 1842, and must be rejected. *Ibid.*
 20. Sums charged by a collector as commissions on sums disbursed by the erection of a marine hospital, under the act of the 12th of June, 1858, cannot, when they have not been disallowed by the accounting officers of the treasury, be allowed in set-off against a suit by the United States against such collector for sums alleged to be due from him. *Ibid.*
 21. In case of extra services performed by a collector under the directions of the department, beyond the limits of his district, and which have in character no affinity or connection with the duties of his office, he may be allowed compensation therefor, although it exceeds the maximum for extra services of the opposite nature. *Ibid.*

COLLISION.

1. A schooner was at anchor in good weather, on a clear day, and in a proper place in a harbor. The master of an in-coming steamer, supposing he could pass to one side of the anchored vessel, attempted so to do, but, in the attempt, his vessel touching the bottom, swung round and collided with the anchored vessel. Held, the master of the steamer was at fault in acting upon his own supposition, without proper investigation that he could thus pass the schooner, and that the steamer was liable for the damage resulting from the accident. *Commercial Steamboat Co. v. Dutton*, 537.
2. A schooner was heading southwest by south, a bark north-northwest, with the wind west. The bark was close-hauled on the wind, the schooner running six points off, having the wind somewhat free. The bark was seen from the schooner when at a distance of about two miles, off the weather bow, at which time the helm was hove up and the vessel kept off. The schooner was discovered from the bark when the vessels were about seven or eight hundred yards apart, three points on the bark's weather bow, at which time her helm was put hard up. When the vessels came together the schooner was heading east, the bark northeast or east-northeast. The bow

of the bark struck the schooner by the main rigging, on the starboard side. *Held*, that the bark was responsible for the damages occasioned by the collision. *Crowell v. Bark Radama*, 551.

3. The rule applicable to this case is, that when two vessels are approaching each other from opposite directions, that one which has the wind free, or is sailing before or with the wind, must keep out of the way, and the one close-hauled must keep her course. *Ibid*.
4. Where, in consequence of a collision, the injured vessel drifted ashore, and \$ 1,600 was paid to salvors, the decree of the District Court in awarding \$ 483 on account of salvage was sustained. *Ibid*.

- COMBINATION.

See INFRINGEMENT, 10.

COMMISSIONER OF PATENTS.

1. The commissioner of patents has full power to examine and decide upon an application for reissue; and as there is no provision made for an appeal, the decision must in general be regarded as conclusive in all collateral proceedings. *Goodyear v. Providence Rubber Co.*, 351.
2. In an application for a reissue, the decision of the commissioner, even in the absence of fraud, is not conclusive upon the question whether the improvements set out in the reissue are a substantive part of the invention secured in the original. *Cahart v. Austin*, 528.
3. Comments on *Stimpson v. Westchester R. R.*, 4 How. 404. *Ibid*.
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5. Neither has he any authority, pending an application for reissue, to hear testimony as to what the invention was, and allow the applicant to amend his claims and specification, so as to embrace whatever the proofs show he invented, although the reissue may thus show improvements neither described, suggested, nor indicated in the model, drawings, or specification of the original. *Ibid*.

COMMISSIONS.

See COLLECTOR, 18 - 20.

CONDITION PRECEDENT.

See CHARTER-PARTY, 7.

CONSTRUCTION.

1. Where, in the construction of a foreign patent in a foreign language, two different translations of a certain phrase were suggested, that one which was more literal, which better accorded with the other parts of the instrument not involved in doubt, and was more in harmony with the nature and application of the invention, was adopted by the court. *White v. Allen*, 224.
2. The patent in this case was for an air-tight coffin, corresponding nearly with

the human form, composed of two parts, or shells, united by a flanch, each shell being made of cast or raised metal, so as to resist great external pressure, and require less weight of metal than ordinary metal coffins, and each forming a part of the receptacle for the body, and having the line of their juncture nearly at the line of the greatest diameter of the body; *held*, that the subject of the patent was not the same as the ancient mummy cases of Egypt, and that those mummy cases were not of a character to supersede the invention because they are of wood; they are not impervious to air; they are not composed of two shells united at the line of the greatest diameter of the body; only one of their parts was employed as the enclosure of the body; the two parts were not united by a flanch, and did not both conform to the shape of the human body. *Forbes v. Barstow Stove Co.*, 379.

3. A caveat describing a cast-iron case, without any bottom, to let down over an ordinary coffin, after the latter was deposited in the grave, to serve for a covering and protection thereto, was *held* not to be of a nature to supersede the invention patented, in this case, although the caveator had specified that the metal case might be used for a coffin. *Ibid*.
4. Such expression must, in construing the caveat, be taken in connection with the statement that the invention was intended to supply the place of a rough coffin, or a brick or stone vault, and to contain and enclose a common coffin. *Ibid*.
5. The first claim in a patent on an improved refrigerator was as follows: the employment of an open-bottomed ice-box, or equivalent thereof, in combination with a dividing partition, open above and below, so placed, that by means of self-operating internal circulation, the whole of the contained air shall be kept in motion and caused to revolve around this partition in currents, moving downward only on one side of the partition, and upwards only on the other, when the same is combined with a chamber for the refrigeration of food placed directly under the ice-box as set forth. This was immediately followed by a disclaimer of the vertical partition by itself, and the placing of articles to be refrigerated in a descending current of air. *Held*, it was a claim for the combination of three elements, viz., an open-bottomed ice-box, the partial partition, and the refrigerating chamber, operating as described in the specification. *Roberts v. Harnden*, 500.
6. The claim in a patent for an improved shoe-last was as follows: "The sectional shoe-last *a, b, c*, formed in the manner specified, with the measurement 4 (which is the line drawn across the last from the corner of the toe to the back of the heel, at the upper part) as short as the measurement at the line 6 (which is the line drawn around the base of the last, from the corner of the toe to the centre of the heel at the junction with the sole), for the purposes as specified." *Held*, that the claim was not for a combination, where the invention consisted of a new arrangement of several old elements, but was for the peculiar form of the described device, in which the toe was elevated higher than usual, the back of the heel thrown forward, and which was as short in the first measurement described as in the second. *Mabie v. Haskell*, 507.

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See INSURANCE, 7; MORTGAGE, 1, 2; PRACTICE, 22; REISSUE, 5, 6, 10; SPECIFICATION, 1, 2.

CONTRACT.

Certain mariners contracted orally with the master of a fishing-vessel to serve as fishermen during a specified time, and for a certain rate of wages in money, and, in pursuance thereof, went on board the vessel. Some days afterward, and while she was fitting for the voyage, at the master's request the men signed certain articles which, among other things, contained a "shares" clause, but without reading the articles or being informed of the purport thereof. *Held*, that the mariners were entitled to recover wages in conformity with the oral agreement, and that such oral agreement was not merged in the subsequent written one. *Sweeney v. Cloutman*, 85.

See JURISDICTION, 1; SHIPPING, 5.

CORPORATION.

1. Certain persons in Massachusetts associated themselves together, prior to the filing of the bill in this case, by articles of agreement in writing, and formed a corporation by the name used in the bill of complaint, to manufacture and sell certain articles under letters-patent which were by the inventor assigned to the company. It was contended that the associates were not a corporation under the Gen. Stat. Mass. chap. lxi. p. 341. The defence was not set up in the answer to the bill, but defendant gave notice of his intention to plead the same in bar of the suit. *Held*, that such defence must be pleaded in abatement, not in bar, and could not be put in under the general issue. *Dental Vulcanite Co. v. Wetherbee*, 555.
2. Corporations may have the same remedies at law or in equity as natural persons; and the general issue pleaded to a suit brought by the corporation is an admission of its corporate existence. *Ibid*.

COVENANT.

See INSURANCE, 2, 3.

CURRENCY.

See SHIPPING, 5.

DAMAGES.

1. Where damage is sustained in a case not falling within the category of an inevitable accident, and neither party is in actual fault, the loss must fall on him who, from the relation he bears to the transaction, is supposed to be possessed of the necessary knowledge to have avoided the difficulty. *Pierce v. Winsor*, 18.
2. Respondents chartered a vessel, and put her up as a general ship. Among other freight was an article new in commerce, and which was so affected by the voyage that it injured other parts of the cargo in contact with it, and

involved an increased expenditure in discharging. The dangerous character of the article was unknown either to the shippers or the owners, and no actual fault was imputed to either. *Held*, that the damage and expenses occasioned by the peculiar character of the article must be borne by the shippers. *Ibid*.

3. Jurors are bound in a suit to recover damages for the infringement of a patented invention, to follow and correctly apply the instructions of the court as to the construction of the respective claims of the patent; and where they do not do so, the verdict will be set aside and a new trial granted, if a motion to that effect is seasonably filed. *Johnson v. Root*, 108.
4. Where nominal damages were claimed by the plaintiff for the infringement of a patent on a sewing-machine, and the evidence showed that the defendant had sold but one machine, and the court instructed the jury to return only nominal damages, it was *held*, that a verdict for \$ 500 was excessive, and that this error could not be obviated by allowing the prevailing party to remit the excess. *Ibid*.
5. Such course may be adopted in cases where the court is satisfied that the error has resulted from oversight or mere inadvertence; but where, as in this case, the finding is not only contrary to the evidence, but in direct contravention of the instructions of the court, the difficulty cannot, in general, be remedied in that way. *Ibid*.

See CHARTER-PARTY, 6; COLLISION, 4; INFRINGEMENT, 9; JURY, 5; MASTER IN CHANCERY, 1; NEW TRIAL, 1-3; TRESPASS, 3.

DECISION, RULE OF.

See ASSIGNMENT, 1, 2.

DEED.

The description of the premises in the deed B. to F. was as follows: "A certain lot, piece, or parcel of land in said cherry-field, and on the west side of the Narragausus River, and being all the lot of land which said Burbank purchased of one Joseph Chamberlain, except that part of said lot which said Burbank has heretofore sold and conveyed to said Freeman by deed, together with all the buildings, privileges, and appurtenances thereto belonging," there being no evidence of any prior deed from B. to F. it was *held*, that the title to the whole lot passed by the conveyance. *Weld v. Madden*, 584.

See NOTICE, 1.

DEFENCE.

1. Whenever it is set up in defence, that the respondent has substantially departed from an existing patented machine or structure, he must show, or it must appear, that the departure or difference is such as involves inventive genius, and that the change is not within the scope of mere mechanical skill. *Forbes v. Barstow Stove Co.*, 379.

2. Improvement of a patented invention is not in general an answer to the charge of infringement; and the defence that the article produced by the respondent is not as good as that of the complainant, is untenable and inadmissible, especially if it is shown to embody all the characteristics which distinguish the article alleged to be infringed. *Ibid.*
3. Non-joinder of licensees in a bill for an infringement of a patent constitutes no defence after the cause has been set down for final hearing. *Ibid.*
4. Where the defence to a bill in equity charging infringement of certain letters-patent is, want of novelty, and a denial that the patentee was the original and first inventor of the thing claimed, the party using this defence must establish it to the satisfaction of the court, else the patentee will be presumed to be the rightful grantee of the patent. *Wing v. Richardson*, 449.
5. The court will use care that inventors are protected from the unjust claims of persons asserting themselves to be the original inventors of what has been patented to another, with a view to destroy the validity of the patentee's exclusive privilege; and, on the other hand, the public must be protected from patents which, by means of reissues, have been so expanded as to embrace more than the real invention of the patentee. *Ibid.*

See INFRINGEMENT, 14, 15; PRACTICE, 21.

DELIVERY.

1. Where delivery is made, upon an understanding between the parties that the transfer of the goods from the ship to the warehouse shall not be regarded as a waiver of the lien, no such consequences follow.
2. In this case the clause giving the five and ten days' credit was not a waiver or displacement of the lien, because the word "discharge" refers to the unloading merely, and not to the delivery of the cargo. *Kimball v. Ship Anna Kimball and Cargo*, 4.

See LIEN, 1.

DISCHARGE.

See INSOLVENCY, 1; PAYMENT, 1-4.

DISCLOSURE.

1. A person being arrested by virtue of an execution issued on a judgment recovered against him in the Supreme Court of Maine, having given the bond provided in the 22d section of chapter 113 of the Revised Statutes of that State, and having cited the creditor before two justices of the peace and quorum, and having submitted himself to examination, is not entitled, before his disclosure is completed, to surrender himself into the custody of the jailer of the county where he was arrested, and there complete, before the same justices' court, the disclosure began before the surrender. *Burnham v. Adams*, 569.
2. If, under such circumstances, the justices decide that the debtor is entitled

to the benefit of the oath provided in the 28th section, and deliver to him the certificate prescribed in section 31, the debtor is not entitled to recover in an action of trespass for damages against the jailer for refusing to release him. *Ibid.*

DUTIES.

See IMPORTS, 3, 4, 5, 7.

EQUITY.

See JURISDICTION, 5, 6, 7; See PLEADING, 1, 2, 3.

EQUIVALENT.

See INFRINGEMENT, 10.

EVIDENCE.

1. Where the complaining party parts with the title, and it passes from him to the respondent, the rule admitting extraneous evidence to show the real character of the conveyance may apply; but it has no application to a contract to convey land, or to an agreement to give a bond or written instrument to convey the same, in cases where the party to be charged derived his title from a stranger. *Tobey v. Leonard*, 40.
2. In a suit to compel performance of an alleged oral agreement to convey lands, not purchased by respondent of the complainant, *held*, that evidence to show that the complainant or his grantor had a right to redeem certain parcels of the land was inadmissible, under the pleadings, the bill confessedly not being one for redemption. *Ibid.*
3. Where fraud is imputed in the bill, and the answer is responsive and the denial positive, the universal rule is that a decree cannot be pronounced on the testimony of a single witness, unaccompanied by corroborating circumstances. *Parker v. Phetteplace*, 70.
4. Inasmuch as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances, in addition to his single witness, to turn the balance. *Ibid.*
5. Satisfactory proof may be made by circumstances alone, or partly by circumstances and partly by direct testimony, or entirely by the latter. *Ibid.*
6. Whatever be the nature of the evidence, the measure of proof required is the same; that is, it must be equal to two witnesses, or one witness with corroborating circumstances sufficient to turn the balance. *Ibid.*
7. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony upon the ground that any particular circumstance is irrelevant or of an inconclusive nature and tendency, are not favored, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other or with the direct proofs in the case. *United States v. Bark Isla de Cuba*, 295.

8. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. *Ibid.*
9. Separate examination of circumstantial facts is indispensable in order to ascertain whether the facts themselves are fully proved, but the final determination of the issue or matter in controversy, cannot safely be placed entirely upon that examination. *Ibid.*
10. In this case, which was a libel of information against a vessel for engaging in the slave-trade, the truth or falsity of the charge depends, not only upon a view of the circumstances attending the fitting, equipping, and loading of the vessel, but also of the circumstances of the voyage, and both of these must be weighed in connection with the declarations of the master, which are clearly admissible, and are by law to be regarded as direct evidence in cases of this description. *Ibid.*
11. Declarations of the master of a vessel engaged in an illegal traffic, as to his suspicions that the purpose of the voyage was not legal, are not mere opinions, but rather admissions; and where he occupies to the vessel the double relation of owner and master, are clearly admissible in evidence. *Ibid.*
12. In a proceeding between the government and a patentee to set the patent aside, or in an application for an extension, proof of fraud is conclusive, but it must be clear and satisfactory. *Goodyear v. Providence Rubber Co.*, 351.
13. In this case proof that the extension was obtained by fraud was held insufficient; but if it had been full it would not have availed the respondents, because they were shown to have consented to the acts complained of. *Ibid.*
14. Where a defendant did not set out in his answer to a bill for the infringement of a patent, an invention upon which a caveat had been filed, and when subsequently, with leave of court, testimony concerning the invention was taken and filed in the case, but no corresponding amendment was made in the answer, doubts are entertained whether the testimony was properly in the case. *Forbes v. Barstow Stove Co.*, 379.

See EXCEPTIONS, 4-6; PATENT, 3; PRIZE, 7.

EXCEPTIONS.

1. Refusal by the court to grant instructions as prayed is not error, unless the instructions requested were themselves correct, and needful to enable the jury rightly to perform their duty. *Locke v. United States*, 574.
2. The clerk's minutes contained the statement that the claimant excepted to certain rulings of the court, and that the bill of exceptions was sealed and placed on file, but in fact none such was ever allowed; but the claimant insisted that the rulings were open to comment by him, because apparent on the record. *Held*, that the statement in the minutes was of no avail to the claimant in the appellate court, unless the exception was seasonably reduced to writing and embodied in a regular bill of exceptions. *Ibid.*
3. The concluding paragraph of exceptions was, that "the court would set their seal to the bill of exceptions containing the several matters proved and given

in evidence; and the rulings, rejections, and directions of the judge." No particular ruling, direction, or rejection was specified. *Held*, that mere objections to evidence are of no avail in an appellate court, unless it appears that the party excepted at the time. Exceptions must be taken at the time; but if seasonably taken and reserved, they may be drawn out afterward. *Ibid*.

4. It cannot avail the excepting party in the appellate court where the record stated that he excepted to a certain deposition, leaving it to be inferred that he objected to its admissibility, but stating no ground of objection, and the caption of the deposition not being in the case. *Ibid*.
5. Where special objections are taken to certain parts of the testimony of a deponent, but none to the ruling of the court, they were overruled. *Ibid*.
6. Exceptions to the admissibility of certain evidence to contradict a witness, when no foundation for the contradiction had been laid, are of no avail in the appellate court, the record not stating that the complaining party excepted at the time to the ruling of the court below in admitting the testimony. *Ibid*.
7. Exceptions to the charge of the presiding judge, on the ground that the language employed was ambiguous, cannot be sustained when the complaining party had made no request at the time for a clearer statement of the views of the court, when the ambiguity was not of a character calculated to mislead the jury, and was understood by the appellate court. *Ibid*.

EXPERIMENT.

See ABANDONMENT, 3.

EXTENSION.

See EVIDENCE, 12, 13.

FEIGNED ISSUES.

1. In an equity suit, a motion that all proceedings be stayed, and that complainant be required to bring an action at law, or else that issues be framed for a jury, is sometimes granted where the originality of the invention is doubtful, or where the controversy chiefly depends upon disputed questions of fact; but where the invention is of long standing, and the inventor has had exclusive possession under it, the motion is seldom received with favor. *Howe v. Williams*, 245.
2. Such motion ought not in general to be granted, where it appears that a hearing in equity and a trial at law have already been had, and that both resulted in favor of the complainant. *Ibid*.
3. The general rule is, that an interlocutory order for issues to a jury in an equity suit will not be directed until the proofs are taken and publication has passed. *Goodyear v. Providence Rubber Co.*, 351.
4. It is not indispensably necessary, as a matter of law, in any case, that any question in an equity suit in a Federal court should be sent to a jury. *Ibid*.
5. When feigned issues are directed by the court sitting in equity, it is gener-

ally done upon the ground that the evidence in the record is not of a character, or not sufficient to afford the means of a satisfactory conclusion; but the verdict of the jury is only advisory, and may be set aside or even overruled. *Ibid.*

See INJUNCTION, 2.

FISHING VESSEL.

See CONTRACT, 1.

FRAUD.

See LIMITATIONS, 3, 4; PLEADING, 3.

FURTHER PROOF.

See PRIZE, 1, 8.

HABEAS CORPUS.

1. Courts of justice may refuse to grant the writ of habeas corpus where no probable ground for relief is shown in the petition, or where it appears that the petitioner is duly committed for felony or treason plainly expressed in the warrant of commitment. *In the Matter of W. H. Winder, Petitioner*, 89.
2. But where probable ground is shown that the party is in custody under or by color of the authority of the United States, and is imprisoned without just cause, and therefore has a right to be delivered, the writ of habeas corpus then becomes a writ of right, which may not be denied. *Ibid.*
3. The service of the writ in this case was prevented by force. The writ was ordered to be placed on the files of the Court, to be served when and where its service might become practicable. *Ibid.*

IMPORTS.

1. By the act of the 2d of March, 1799, casks, chests, or cases of distilled spirits, wines, and teas, when imported, were required to be branded or otherwise marked by the surveyor or other officer acting as inspector of the revenue for the port where such merchandise was landed. *United States v. Austin*, 325.
2. When thus branded, it was the duty of the surveyor or chief officer of inspection to give a certificate to the proprietor, importer, consignee, or agent, of the whole quantity of such spirits, etc., also the name of such proprietor, etc., the name of the vessel from which such importation was landed, and of the marks of each cask, etc. *Ibid.*
3. The plaintiffs, prior to July 14, 1862, made certain importations into the United States, and warehoused the same. Upon these importations the duties were ascertained, according to the existing act of August 5, 1861; and when said importations were made, the act of August 5, 1861, was in force. The importations were withdrawn from the warehouse, for consumption, after the first day of August, 1862, and after the act of Congress of July 14, 1862,

- took effect, each withdrawal having been made more than three months from the date of importation, but less than three months from the date of the deposit in the warehouse. *Held*, that the importations were subject to the duties prescribed by the act of July 14, 1862. *United States v. Benzon*, 512.
4. By the act of March 2, 1862, the importer could withdraw his merchandise from warehouse within three months from the time of depositing them there; but by the act of July 14th this period was changed to three months from the date of original importation. *Held*, that the act of July 14th, in its application to a case of this nature, was operative^a and constitutional. *Ibid*.
 5. The provisions of the act of March 2d, relating to the time in which the importations might be withdrawn from warehouse, is not to be considered a contract between the importer and the government, but a regulation of a privilege granted by the government, which privilege the government may entirely withhold. *Ibid*.
 6. Similar changes have frequently been made upon this subject by Congress. *Ibid*.
 7. The importation of goods, as between the importer and the government, is not complete as long as the goods remain in the custody of the officers of the customs; and until they are delivered to the importer, whether on shipboard or in warehouse, they are subject to any duties on imports which Congress may see fit to impose, and to new legislation as well in relation to duties as to alteration in warehouse laws. *Ibid*.
 8. When goods are purchased in a foreign country, for importation into the United States, and in quantity sufficient to load several vessels, under the act of March 3, 1863 (2 Stat. at Large, 737), an invoice executed in triplicate must be produced and exhibited to the American consul at or before each shipment, and where the importation is by rail, the same rule applies to each train of one or more cars laden with the dutiable goods. *Locke v. United States*, 574.
 9. Importers cannot commingle lawful and unlawful importations in the same invoice, so that they cannot be distinguished, and be allowed to save any portion of the goods from forfeiture. *Ibid*.

INFORMER.

1. A master of a vessel, while in a foreign port, becoming convinced that it was the intention of certain persons on board to employ her in the slave-trade, brought the vessel to a port in the United States. When he arrived at the port for which he had sailed, he was towed into the harbor by a steamer, the master of which, learning from some person or persons on the vessel that she had been intended for the slave-trade, went, immediately upon landing, to the United States district attorney, gave information of the intended slaver, and made a sworn statement thereupon. The master of the vessel, on the following day, also gave the intelligence to the attorney, having, on the day previous, presented the ship's papers at the custom-house, and made known the facts to the revenue officers. After the decree of distribution awarding the prosecu-

tor's moiety to the captain of the intended slaving vessel, and after the payment of the moiety in conformity to the decree, upon petition by the master of the steamer to open and set aside the decree of distribution, it was *held*, that the award had been properly made under the act of the 20th of April, 1818; and that this being the case, it was not necessary to decide whether it was competent for the court to open the decree and take jurisdiction of the second petitioner's claim. *United States v. Isla de Cuba, Dodge, Petitioner*, 458.

^A INFRINGEMENT.

See EVIDENCE, 14; ASSIGNMENT, 1, 2.

INFRINGEMENT.

1. A railroad corporation made a contract with a manufacturer for the building of certain cars, to contain, among other things, a certain patented improvement of a third party. The contract was, in behalf of the corporation, signed by the chairman of the directors, as chairman. The contractor had no license to use the patented improvement. Suit by the patentee against the said chairman. *Held*, the defendant's contract could not be construed as authorizing or contemplating any trespass upon the rights of the patentee, and that he was not liable. *Lightner v. Brooks*, 287.
2. Both the master who commands the doing, and the servant who commits the act of trespass, may be made responsible as principals, and may be sued jointly or severally. *Ibid*.
3. But in this case, even if the contract be regarded as that of the defendant, it does not amount to a command, direction, or authority to the contractor to use the patentee's invention without license, neither is there any reason to infer that there was any such relation as that of master and servant, either between the contractor and the defendant or between the contractor and the railroad company. *Ibid*.
4. Whether the rule would be different if the materials had been furnished by the company, and the contractor had been at work in their shop, *quare*. *Ibid*.
5. Unless it be assumed that the defendant contracted that the builder of the cars should use the plaintiff's improvement without license, it cannot be admitted that the contract furnishes any ground to infer, that any violation of the rights of the plaintiff were intended by a stipulation for the delivery of the cars to the railroad company. *Ibid*.
6. Where the patentee is the original and first inventor of that which is described in his patent as his invention, he has a right to treat as infringers all who make and sell substantially the same thing, even though the infringing machine or structure may be an improvement on the patented one. *Forbes v. Barstow Stove Co.*, 379.
7. Where the defendant, an American citizen, had, without license, used the

patented improvement of the plaintiff, on the high seas, on board an American vessel; *held*, that the plaintiff was entitled to recover damages for such use of his invention the same as if it had taken place within the territory of the United States. *Gardiner v. Howe*, 462.

8. Where all the elements of a machine are old, and the invention consists solely in the combination, by which a new and useful result is effected as compared with the old or previous machine, on which the improvement is made, no one can be held as an infringer who does not use all of the elements of the new combination. The invention consists in the new combination, and to that and its results the originator is entitled, but he cannot invoke the doctrine of equivalents to suppress any other invention which does not embrace his improvement. *Roberts v. Harnden*, 500.
9. The ice-box in the refrigerator of the complainant was described as an open-bottomed one, and was so made by making holes in the sides and bottom thereof; that of the respondent exhibited an eduction passage for the air across the bottom of the ice-box in the rear. The refrigerator of complainant was vertically divided by a partition, not however reaching the top and bottom of the inside, but allowing at each end a space for air circulation, produced by difference in temperature of the two divisions. One side of respondent's ice-receptacle served for the partition, which allowed a wider space at the bottom than complainant's, and it was claimed that the circulation was irregular and different from the complainant's. *Held*, that although the operation of the two might be different in the particular that the respondent's was the more imperfect of the two, the purpose and operation of the two devices in the two patents was substantially the same. *Ibid*.
10. In both inventions, the general tendency of the air in the compartment containing the ice-receptacle was downward, by reason of its comparative lower temperature and greater density; and in consequence of being warmer in the other division, upward. *Ibid*.
11. If two machines produce substantially a similar result by substantially similar means, no proof of difference between them lies in the fact that one is less effectual in operation, or more imperfect in structure, than the other. *Ibid*.
12. It was set up in defence that the respondents did not infringe the rights of the complainants, because the last made by respondents was made in two, while that of complainants was made in three, sections. *Held*, that such a defence only had force where the patent of the complainant was for a combination, all the elements of which were old, and which was only infringed when the entire arrangement or combination was wrongfully used. *Mabie v. Haskell*, 507.
13. It is not a defence to the charge of infringement upon a patent for an improved shoe-last, that it cannot be construed to embrace boot-lasts, when it appears in evidence that respondents had used the invention, without alteration, in the manufacture of boots as well as shoes. *Ibid*.

INJUNCTION.

1. It is competent for the Circuit Court to entertain a bill of complaint, founded on letters-patent of the United States, for an injunction, for an account, or for the repeal of an interfering patent for the same invention. *Ayling v. Hull*, 494.
2. The motion for injunction is addressed to the discretion, and the court may or may not, according to the circumstances, order issues for a jury. *Ibid.*

INSOLVENCY.

A certificate of discharge under the bankrupt or insolvent laws of one State cannot be pleaded in bar of an action brought by a citizen of another State. *Stevenson v. King*, 1.

INSTRUCTIONS.

See EXCEPTIONS, 1.

INSURANCE.

1. Policies of insurance against loss by fire are contracts of indemnity; and if the insured parts with his interest in the property before the loss, it invalidates the contract and releases the insurer. *Hidden v. Slater Ins. Co.*, 266.
2. Buildings held under a lease may be insured against loss by fire, but the policy, in such a case, becomes invalid, if the lessee, by mortgage and foreclosure, or otherwise, parts with his interest in the leasehold estate before the loss occurs. *Ibid.*
3. The covenant in a lease of real property, to pay an amount in addition to a specified rent, equal to taxes and the cost of insurance for a certain sum, confers no authority upon the lessee to insure the buildings on the leased premises for the benefit of the lessor. *Ibid.*
4. Such a covenant still leaves it optional with the lessor to insure or not as he may choose, and when and where he pleases; but if he neglects to insure, the lessee has nothing to pay on that account. *Ibid.*
5. Viewed in any light, the case shows that the insured had parted with his interest before the loss, and therefore the plaintiff cannot maintain this action, as he cannot have any greater right than the insured. *Ibid.*
6. Where a ship was taken and burned by the commander of a rebel privateer, during the late Rebellion, held, that the capture was not a taking by pirates or assailing thieves, inasmuch as it appeared that the policy upon the vessel was executed before the Rebellion broke out, and that the commander acted under a commission in due form issued by the government of the rebellious States. *Dole v. New England Ins. Co.*, 394.
7. Construed separately from the marginal clause, the terms of the policy would entitle the plaintiff to recover, but the legal effect of the marginal words, "warranted free from capture, seizure, or detention," &c., is, that the insurers are no more liable for a loss occasioned by those perils, than they would have been if the body of the policy had contained no stipulation to that effect, or if

the stipulation therein had been that they should not be liable for such losses. *Ibid.*

8. Loss by capture not being included in the policy, it is clear that the plaintiff cannot recover, unless it can be held that the fire, and not the taking of the ship, was the proximate cause of the loss. *Ibid.*
9. Seizure of ships at sea by the ruling power of a country in a time of territorial war is a capture within the meaning of the law of insurance, although the war is waged on one side by a rebel government and people; and it seems also that the word "capture" is sufficiently comprehensive to include a taking by pirates. *Ibid.*
10. When different causes concur in occasioning a loss, the rule is, that the loss must be attributed to the efficient predominating peril, whether that peril was or was not in activity at the final consummation of the disaster. *Ibid.*

INTERNAL REVENUE.

1. The defendants were manufacturers of woollen goods. They bought wool, spun it into yarn, and then wove the yarn into fabrics for clothing. This yarn was not known in the market as an article of trade, as manufacturers of the particular fabrics spun it themselves. An internal-revenue tax of five per cent upon the full value of the manufactured fabrics had been assessed and paid; and subsequently a reassessment of five per cent on the value of the yarn from which the fabrics were manufactured had been made, and assumpsit was brought to recover the same. *United States v. Washington Mills*, 601.
2. Assessment was made under the act of June 30, 1864, and before the passage of the act of March 3, 1865. *Held*, that the yarn was a separate and independent manufacture, and was properly subject to the assessment of five per cent. *Ibid.*

INVENTION.

See PATENT, 5 - 7.

INVENTOR.

Where it appeared that a person was employed by an alleged inventor to make experiments upon the invention, and that such employee before that time had tried a single imperfect experiment; that previous to such person being employed, the alleged inventor had filed a caveat upon the invention; that a contract was entered into between the two, in which the patentee was treated as inventor and the other party as an employee, and the employee had never in his lifetime made any claim as the inventor: *Held*, that although the experiments were conducted to a successful issue, the person employed could be considered neither a sole nor joint inventor of the improvement. *Dental Vulcanite Co. v. Wetherbee*, 555.

See INFRINGEMENT, 6.

INVOICE.

See IMPORTS, 8, 9.

JOINDER.

See DEFENCES, 3; PRACTICE, 18 - 20.

JUDGMENT.

See TRESPASS, 2, 3.

JURISDICTION.

1. A contract to furnish materials for the construction of a vessel, even where the same is built upon the shores of tide-waters, and designed for use upon the navigable water of the sea, is not within the admiralty jurisdiction of the United States Courts. *Young v. Ship Orpheus*, 29.
2. A vessel was seized under the act of March 22, 1794, as being fitted and prepared for the slave-trade. At the time of the service of the monition by the United States marshal she was in the possession of a State sheriff, by virtue of an attachment issued from a State court. *Held*, that this court still had jurisdiction, because forfeiture of a vessel arises from the wrongful act of the owner, or some person in charge of the vessel, and wherever the forfeiture is made absolute by an act of Congress, the forfeiture attaches at the time the wrongful act is committed, and consequently the owner is divested of his title *eo instanti*, and the same becomes vested in the United States. *United States v. Bark Reindeer*, 57.
3. The possession of a sheriff, under civil process, whether from State or Federal court, will not defeat the operation of the revenue laws of the United States, or impair a forfeiture for engaging in the slave-trade, or for fitting a vessel for the same. *Ibid*.
4. Under the first section of the act of March 22, 1794, a vessel is liable to be prosecuted and condemned for engaging in the slave-trade, in any of the Circuit or District Courts where the vessel may be found and seized. Therefore where a vessel had been fitted and prepared for a traffic of this kind in New York, it was held that she was properly condemned by the District Court of Rhode Island, having been seized there. *Ibid*.
5. The courts of the United States cannot exercise any equity powers except such as are conferred by an act of Congress, and those judicial powers which the High Court of Chancery in England, under its judicial capacity as a court of equity, possessed and exercised at the time of the formation of the Constitution of the United States.
6. Powers not judicial, exercised by the Chancellor as the representative of the king's prerogative, are not possessed by the Circuit Courts.
7. The prerogative power belonging to the sovereign has not been delegated to the Federal government, but remains in the several States, to be exercised according to the laws and usages there prevailing. *Loring v. Marsh*, 469.

See COMMISSIONER OF PATENTS, 4; INJUNCTION, 1; PRACTICE, 11.

JURY.

1. Irregularity on the part of the party charged, or misconduct of the jury, must be satisfactorily proved, in order to lay the foundation for the interposition of the court. *Johnson v. Root*, 108.
2. In that state of the case it is sufficient that the irregularity appears to be of such a character that it might have affected the impartiality of the proceedings. *Ibid.*
3. Any improper interference with jurors may afford sufficient grounds for granting a motion for new trial; and it is not necessary that the attempt to influence the jurors should be made by one of the parties, nor even by his agent. *Ibid.*
4. It is sufficient if it clearly appear that it was done in the behalf of one of the parties; and it is never indispensable to show that the misconduct controlled or determined the verdict. *Ibid.*
5. On a motion for new trial, strong ground to conclude that the plaintiff knew what the result would be, before the verdict was rendered, and disregard of the instructions of the court by the jury, as to the merits of the controversy and the measure of damages, are facts and circumstances sufficient to produce conviction in the mind of the court that the parties have not had an impartial trial agreeably to law. *Ibid.*

See NEW TRIAL, 1, 2.

LEASE.

See INSURANCE, 2-4.

LICENSE.

Construction of the license under which the defendants claimed to manufacture the articles covered by complainant's patents. *Goodyear v. Providence Rubber Co.*, 851.

LIEN.

Delivery without any condition or qualification annexed is a waiver of the lien, because the lien is but an incident to the possession. *Kimball v. Ship Anna Kimball and Cargo*, 4.

See CHARTER-PARTY, 1-4; SHIPPING, 4.

LIMITATIONS.

1. In many cases courts of equity act upon the analogy of the limitations at law, as where a legal title would, in ejectment, be barred by twenty years' adverse possession; but there is a defence peculiar to courts of equity, founded on lapse of time, where no statute of limitations governs the case. *Badger v. Badger*, 137.
2. In such cases courts of equity often act upon their own inherent doctrine of discouraging antiquated demands, by refusing to interfere where there has

been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. *Ibid.*

3. Where the bill of complaint set up that fraudulent acts had been committed more than thirty years previous to the bill of complaint, but the complainant averred that the same were unknown to him until five years previous to the same, without setting up that the fraudulent acts were in any manner concealed from him, it was *held*, that a court of equity could not regard in such a case such general allegations of excuse. *Ibid.*
4. If the complainant seeks to avoid the effect of lapse of time, on the ground of concealed fraud, he must set forth, with particularity, when and by what means the fraud was discovered, and the averments so made must be supported by the proofs. *Ibid.*
5. In the case of a stale claim, barred by lapse of time, by gross laches, and long unexplained acquiescence in the operation of an adverse right, courts of equity will often treat the lapse of a period less than the one specified in the statute of limitations as a presumptive bar to the claim. *Ibid.*

MACHINE.

See PATENT, 11 - 15.

MARINER.

See SHIPPING, 6, 7.

MASTER.

See SHIPPING, 12.

MORTGAGE.

1. Where a mortgage for the security of certain payments, as well as for the performance of a certain specified agreement, further provided that it should also become security for the performance of a certain other agreement, if the mortgagor should elect to perform the second agreement, *held*, that after election and notice by the mortgagor, such mortgage became security for the performance of the second agreement, as effectually as if the same had been set forth in the mortgage. *Furbish v. Sears*, 454.
2. By the conditions of the mortgage, it was stipulated "that on nonpayment of certain instalments, the mortgagee was authorized to sell the mortgaged property at auction, giving thirty days' notice, the proceeds to be applied to the payment of the instalments overdue and unpaid; and if at any time after such disposal of the mortgaged estate, any other instalments shall become due, and remain unpaid ninety days, the agreement shall become null and void, and no further obligatory in any way on either party." *Held*, that the power to sell was merely cumulative, and did not debar the party from foreclosing the mortgage. *Ibid.*

MASTER IN CHANCERY.

The decree of the court was, that the complainants were confirmed in their right and title to divert and use the water of a certain stream, through a canal, for mill or other uses, subject to the right of the respondent to use the water of said river for irrigation only, in accordance with a reservation in the deed under which the complainants claimed, and also by virtue of a certain agreement between the canal company and the grantor in the said deed; and that the cause be referred to a Master to ascertain and report the amount of damage, if any, sustained by the complainants in consequence of the insertion by the respondent of a flume or culvert in the bank of the canal, as admitted in his answer; also, what structures were proper and needful to enable the respondent to enjoy and use the right to divert the water for the purpose of irrigation, in accordance with the reservation contained in the deed and the agreement. *Held*, that the decision of the Master to the effect that the complainants were not entitled to any damages, was inconsistent with the decree which assumed that a wrongful act was charged in the bill and confessed in the answer, and therefore that the complainants were at least entitled to nominal damages. *Held*, also, that proper and needful structures, within the meaning of the decree, were not only such as would enable the respondent to enjoy and use the right to divert the water for the purpose of irrigation, but such as would enable him to do so, as far as practicable, consistent with the right of the complainants to insist that only so much water should be taken as might be reasonably necessary for that purpose; that the Master erred in holding that it was not within his province to provide a safe preventative against any possible abuse of his right by the defendant: and that the cause must be again sent to the Master under the present construction of the decree. *Lonsdale Co. v. Moies*, 538.

NAVY AGENTS.

1. The appointment of navy agents was first authorized by the act of March 3, 1861. By that act the maximum compensation of such officers is fixed at three thousand dollars per annum. *United States v. Wendell*, 340.
2. Such maximum compensation is in terms based on the period of one year, to be derived from commissions on disbursements, but cannot exceed three thousand dollars, even though the legal rate of commissions on sums actually disbursed would amount to more than that sum. *Ibid*.
3. The amount disbursed does not determine the maximum, but only the proportion of the maximum to which the officer is entitled when his commissions do not reach the maximum amount; and the excess of one year cannot aid the deficiency of another. *Ibid*.
4. Annual compensation is the rule of decision, not per quarter nor for any subdivision of a year. *Ibid*.
5. Yearly disbursements, as ascertained by the monthly accounts, furnish the means of computing the yearly compensation of the navy agent, with the limitation that the compensation cannot exceed three thousand dollars. *Ibid*.

6. Time of service and the amount disbursed furnish the data for computing the amount of compensation for any fractional part of a year, because the maximum being based on an entire calendar year, the proportion due the officer can only be ascertained by calculating the proportion of the year which may have elapsed. *Ibid.*
7. Where an officer of the United States, accountable for public money, refuses to pay into the treasury the sum or balance reported to be due upon the adjustment of his account, under the act of 3d of March, 1797, the accounting officers of the treasury are authorized to add to such sum only the commissions due the officer on such unsettled account. *Ibid.*
8. The statute does not contemplate the forfeiture of all commissions paid such officer upon settled accounts during the whole term of his previous service. *Ibid.*

NEW TRIAL.

1. Where damages awarded by a jury are excessive, the error may in many cases, and under most circumstances, be obviated by remitting the amount of the excess; but where the circumstances clearly indicate that the jury were influenced by prejudice, or by reckless disregard of the instructions of the court, that remedy cannot be allowed. *Stafford v. Pawtucket Co.*, 82.
2. Where such motives and influences appear to have operated on the jury, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding. *Ibid.*
3. Excessive damages having been the foundation of the opinion of the court setting aside the verdict of a jury, and the verdict having exceeded in amount the damages laid in the writ, a *remititur* is not the proper remedy, but a new trial should be granted. *Ibid.*
4. Courts are not inclined to grant a new trial merely on account of ambiguity in the charge to the jury, when it appears that the complaining party made no effort at the trial to have the point explained. *Locke v. United States*, 574.

See JURY, 5.

NEUTRALS.

See PRIZE, 3, 6.

NOTICE.

A deed of certain real estate in Maine was executed in 1836, B. to F., but not recorded till 1838. At the execution of the deed R. was in the occupation of the premises conveyed, and remained there boarding with F. until the next summer, when he left and never returned. F. and his grantees always continued in open, notorious, and exclusive possession of the premises, making valuable improvements thereon. W. on the 8th of October, 1853, attached the premises, and on the 24th of November, 1857, levied on them as the estate of B. *Held*, that these facts constituted implied notice to W. of B.'s deed to F., although the same was not recorded until after the levy. *Weld v. Madden*, 584.

PATENT.

1. A patent is *prima facie* evidence that the patentee is the original and first inventor of what he has therein described as his invention; and when taken in connection with his original application, is *prima facie* evidence that the invention was made at the time the application was filed. *Johnson v. Root*, 108.
2. But when a patentee proposes to show that his invention is of a date prior to his original application, he takes the burden of proof upon himself, and to maintain that theory as against a patented machine, he must prove, not only that he made his invention at the period claimed, but that he reduced the same to practice in the form of an operative machine; and if he fails to prove either of the elements of the proposition, the verdict should be for the opposite party. *Ibid.*
3. Where a plaintiff claimed that he had invented a particular device, constituting a part of a machine, but it appeared that he subsequently took it out of his model and finally substituted another for the same purpose, and did not include it either in his draft of an application for a patent or his model or caveat, and that he never attempted to restore it, until he had seen the invention of the other party, *held*, that those facts were evidence of abandonment for the consideration of the jury. *Ibid.*
4. The presumption of originality arising from the grant of letters-patent extends back only to the date of the filing of the application in the Patent Office. *White v. Allen*, 224.
5. The mere conception of an improvement, however perfect the idea may have been, and although described to a third person, is not invention in the sense of the patent law, if the improvement was never completed. *Ibid.*
6. In order to constitute an invention, the originator of the idea must have embodied his thought in some distinct form, and reduced it to practice. *Ibid.*
7. This rule is subject to the qualification, that he who first invents shall have the prior right, if he uses reasonable diligence in adapting and perfecting his conception. *Ibid.*
8. A new product or article of manufacture, and the process by which the same is produced, may be the proper subjects of separate patents. *Goodyear v. Providence Rubber Co.*, 351.
9. After the originality of Charles Goodyear's invention has been repeatedly affirmed by the Circuit Courts of the United States, and there has been no effort made to call the decisions in question, under the circumstances of this case, those decisions were followed by this court. *Ibid.*
10. The patent granted to Amos C. Barstow, April 19, 1859, was held to be an infringement of the reissued patent on which the suit in this case was founded. *Forbes v. Barstow Stove Co.*, 379.
11. Where a person had purchased of the owner of the invention certain knitting-machines, with which the vendor was accustomed to send a package of the needles used in the same, it was *held*, that the sale of the machines did

not carry with it a right to the purchaser to manufacture new needles of the same construction as those sold him, when those which he had bought were worn out, although the machines could not be operated without them, and the needles were the patented invention of the seller; the needles, however, being the subject-matter of a different patent from that covering the machines. *Aiken v. Manchester Print Works*, 435.

12. The grant of a machine, with the right to use it, does not import the same privileges under the patent as the sale of the right to make and vend the patented machine. *Ibid.*
13. In the latter case the purchaser buys a portion of the franchise, and the right he acquires necessarily terminates at the time limited for the continuance of the patent; but in the former, the machine sold passes outside of the monopoly, and is no longer under the protection of the Patent Act. *Ibid.*
14. Redress for injury in such case must be sought in the State courts, under State laws, and not under the special jurisdiction conferred on the Federal courts by the Patent Act. *Ibid.*
15. In this case the purchasers could repair the machines and the needles, or improve them (if in so doing they infringed no patented right), because both needles and machines had paid the royalty to the patent, and were outside the limits of the monopoly, and the property of the purchaser; but the purchase of these particular machines and devices conferred no power to manufacture new ones to take their places when once worn out or destroyed. *Ibid.*
16. The presumption that the person named in a patent as the patentee, is the original and first inventor of what is therein claimed, arises from the fact of the grant of the patent to the patentee, and does not therefore exist until the issue of such patent. *Wing v. Richardson*, 449.
17. Issue of a patent affords no ground for a presumption in favor of the originality of the patentee's invention, at any time earlier than the filing of the original application in the Patent Office. *Ibid.*
18. If it be desired to show that an invention was really made prior to the filing of the application, it must be done by proper evidence adduced by the party asserting the fact, because no such presumption arises from the patent, or the application, or both together. *Ibid.*
19. The presumption arising from the introduction in evidence of his patents, that the complainant is the original and first inventor of the invention therein described, may be regarded as strengthened by the fact that the complainant's application and respondent's patent were declared in interference at the Patent Office, that the cases were appealed to the Superior Court of the District of Columbia, being at every step decided in the complainant's favor, the respondent, during the entire pendency of the interferences, asserting himself to be the original and first inventor. *Ayling v. Hall*, 494.
20. It was held that the subjects-matter of the complainant's patents were not the same as that of the English patent of Alexander Parker. *Ibid.*
See ABANDONMENT, 6-8; ASSIGNMENT, 1, 2; CONSTRUCTION, 1, 2, 5, 6;

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CORPORATION, 1; DEFENCE, 1-5; FOREIGNED ISSUES, 1-4; INFRINGEMENT, 7-11; PRACTICE, 18-21; PRESUMPTION, 1; REISSUE, 1-3, 10-15; SPECIFICATION, 1-3; SURRENDER, 2.

PATENT OFFICE.

See REISSUE, 4.

PAYMENT.

1. Where two notes of \$5,000 each were received by the owner of the vessel, before her arrival at the home port, payable to his order in six months, and he gave a receipt for them to the charterers, stating that the notes were received on account of the charter of the ship, and that the amount was to be insured by the charterers and charged to the owner, it was *held*, that the notes were not received or given in payment, but as an accommodation to the owner; and having been tendered at the trial, the libellant is entitled to recover the whole balance of the charter-money, after deducting other payments. *Kimball v. Ship Anna Kimball and Cargo*, 4.
2. Payment undoubtedly discharges the lien of the ship-owner; and promissory notes accepted as payment will have the same effect as payment in money. At common law, a promissory note given for a simple contract debt does not operate as a discharge of the original obligation, unless the intention of the parties to that effect affirmatively appears. But the rule in this State is different, and the question in this case must be governed by the rules of law prevailing in the jurisdiction where the transaction took place. *Ibid.*
3. In this State, if a party, bound to a simple contract debt, gives his own negotiable security for it, then, in the absence of any circumstances to indicate the contrary intention of the parties, the presumption is that the bill or note was received in satisfaction of the pre-existing debt. *Ibid.*
4. But as the liability for which the notes were given in this case was contingent, and as the agreement was, that, if the notes fell due before the ship returned, then the libellant was to take them up and renew them, or if the ship arrived before the notes fell due, he was to return them or deduct the amount from the charter-money, it was held they were not given or received in payment. *Ibid.*

PENDING SUIT.

See PRACTICE, 9-15.

PERFORMANCE.

See EVIDENCE, 2.

PERIL OF THE SEA.

See INSURANCE, 10.

PIRATE.

See INSURANCE, 6.

PLEADING.

1. Where the answer is responsive to the bill of complaint, and positively denies the matter charged, and the denial has respect to a transaction within the knowledge of the respondent, the answer is evidence in his favor, and unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other facts and circumstances, which give to it greater weight than the answer, or are equivalent in weight to a second witness, it is conclusive, so that the court will neither make a decree nor send the case to trial, but will dismiss the bill. *Badger v. Badger*, 137.
2. Accusations charging that probate accounts which had been settled for a long time were fraudulent must be specific, and must point out the items of account charged to be false; especially when, as in this case, it appears that all the parties implicated, some of whom had the best means of knowledge in regard to the transaction, were dead. *Ibid.*
3. If express fraud be charged, the rule is that he who made it must prove it; so where license was granted by the Supreme Court of a State for the sale of real estate by administrators, and the complainant, in a bill of equity, prayed that the deeds of conveyance executed pursuant to the license granted might be declared null and void, nothing less than proof of fraud could possibly avail the complainant, as the court to whom the petition was addressed was bound to inquire whether debts were due and unpaid by the estate before they granted the license, and, in the absence of fraud, it must be presumed that the finding of the court was conclusive. *Ibid.*
4. Where matters pleaded in the answer are in avoidance of the claim of the complainant, such allegations are not evidence, but must be proved, and the burden of proof is upon the respondent. *Howe v. Williams*, 245.

See INSOLVENCY, 1; PRACTICE, 1, 2.

POOR DEBTOR.

See DISCLOSURE, 1, 2.

PRACTICE.

1. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, are to be regarded as the rules of decision in trials at common law in the courts of the United States, in cases where they apply. *Loring v. Marsh*, 311.
2. In cases depending upon the statute of a State, especially in those respecting the titles to land, the Federal courts will adopt the construction of the State courts, when that construction is settled or can be ascertained. *Ibid.*
3. The same rule prevails in suits in equity as at law. *Ibid.*
4. The natural import of the words in the Judiciary Act includes the laws in relation to evidence as well as the laws in relation to property. *Ibid.*

5. The construction given to a State statute of the description mentioned, by the State court, is regarded as a part of the statute, and is as obligatory on the courts of the United States as the text; and if the State court adopts new views as to the construction of such a statute, the Federal courts will follow the latest settled adjudication. *Ibid.*
6. The decisions of the State courts, however, cannot be allowed to retroact upon the judgments of the Federal courts. The Supreme Court will not reverse its own judgment in a case depending upon the local law, if correctly given at the time in accordance with the settled construction given to the law by the State court, even should it appear that the State court subsequently changed its views, and adopted a different construction. *Ibid.*
7. The same is true of the decisions of the Circuit Courts.
8. In the absence of any construction of a State statute by the State court, the Federal courts derive their rules from the common law. *Ibid.*
9. Therefore, in an equity suit in this court, in which a motion for continuance was filed, upon the ground that a prior suit was pending in the Supreme Court of the State, depending upon the local law, between the same parties, and involving the same subject-matter, and until such cause might there be heard and determined, *held*, there was no occasion for continuance, because this court, in such case, must follow the construction given to the provision of the local law by the State court, if it can be ascertained; but if it cannot, then the duty of determining the true construction of the provision in question devolves first on this court, and finally on the Supreme Court. *Ibid.*
10. Comments upon *Presbyterian Church v. White's Administrators*, 4 Law Reg. 526. *Ibid.*
11. The Circuit Court has no discretionary power to stay a suit in equity brought therein, or to refuse jurisdiction, on the ground that a prior suit involving the same subject-matter, and between the same parties, is pending in the State court of the district where the Circuit Court is held. *Ibid.*
12. There are cases in which it has been held that the pendency of another suit between the same parties, for the same matter, in another jurisdiction, may be pleaded in bar or in abatement to a second suit. *Ibid.*
13. The rule in this circuit has always been, that the pendency of another action for the same cause in a State court is not a good plea in abatement. *Ibid.*
14. *A fortiori* a motion for a continuance, upon the ground of the pendency of another suit in the State court, cannot be granted here, when it appears to the court that the nature of the proceedings are different, the parties not the same, and there are questions presented for decision not involved in the suit in the State court. *Ibid.*
15. Where, from an inspection of the pleadings which had been regularly filed under the rules, in an equity suit, the court can see that different questions are raised from those presented in a suit in the State court, and pending at the same time, a motion to refer the case to a master, with directions to inquire whether the subject-matter and parties were not the same in the two actions, must be denied. *Ibid.*

16. State regulations to the extent that they define the rules of property are regarded as furnishing the rule of decision, but they do not control or affect the process or practice of the Federal courts. *Goodyear v. Providence Rubber Co.*, 351.
17. The equity practice of the Federal courts, when not controlled by an act of Congress or the rules prescribed by the Supreme Court, is in general regulated by the chancery practice of the parent country as it existed prior to the adoption of what are called the "New Rules." *Ibid.*
18. In this case the bill of complaint was not founded on the title of the original patentee, but on the derivative title of the first-named complainant, to whom, as executor of the patentee deceased, the patent was reissued; therefore, objection to the right of the complainants to maintain their bill, because only one of the persons named as executors in the last will and testament of the original patentee was made party to the bill, cannot be sustained. *Ibid.*
19. The reissued patent, under these circumstances, is a new contract between the government and the executor, since the decease of the original patentee. *Ibid.*
20. Where other persons named as executors, did not join with the complainant in proving the will of an original patentee, or in the surrender or reissue of the original patent, they need not be made parties to a bill of complaint for the infringement of the said reissued patent. *Ibid.*
21. The objection to the maintenance of a bill in equity founded on letters-patent, that the specification did not set forth the invention in such full, clear, and exact terms as would enable any person skilled in the art to practise the invention, is not open to the defendants when no such defence is set up in their answer, and the record shows that application was made to the court to amend in that particular. *Ibid.*
22. In cases depending on the statute of a State, and more especially in those relating to titles to lands, the Federal courts adopt the construction of the State courts, when such construction is settled or can be ascertained; but if the question has not been decided, then the duty of construction devolves upon the tribunal where the case is pending. *Loring v. Marsh*, 469.

PRESUMPTION.

The *prima facie* presumption is, that a reissued patent has been properly surrendered and reissued; and that presumption will prevail in the absence of any controlling evidence to the contrary. *Forbes v. Barstow Stove Co.*, 379.

See PROMISSORY NOTES, 1-3; PATENT, 4, 16-19.

PRIVATEER.

See INSURANCE, 6.

PRIZE.

1. In a prize court, where the motion for further proof was filed in the court below, and was there overruled, and the appeal taken, as well from the ac-

tion of the court in that behalf, as from the decree upon the merits, *held*, that the appellate tribunal would not grant a separate hearing, upon the motion, because the appeal is an entirety, and the several questions involved in it can be most conveniently heard at the same time. *United States v. Brig Lilla and Cargo*, 169.

2. Where such motion was made and overruled in the court below, it cannot be determined whether the action of the court was correct or incorrect, without recurring to the evidence then before the court. *Ibid.*
3. If the neutral owner claims a portion of the cargo, which belongs to an enemy, for the purpose of deceiving the court, the rule is that the part belonging to the neutral will be condemned, as a penalty for the fraudulent conduct; but this rule, perhaps, should only be applied in extreme cases, and where the evidence leaves no doubt of the truth of the charge, and the circumstances afford no ground of justification, palliation, or excuse. *Ibid.*
4. The universal rule is, that, before a claimant can expect an order for further proof to be made, he must be able to render it probable, that if the motion is granted, he will be able to overcome the probative force of the suspicious circumstances. *Ibid.*
5. A purchase of an enemy's vessel in a neutral port, during war, is itself a suspicious circumstance; and whenever such a purchase is drawn in question, the evidence of an absolute and *bona fide* transfer ought to be clearly established. *Ibid.*
6. Neutrals may purchase an enemy's ship, but such purchases are liable to great suspicion; and if full proof be not given of their validity, by bill of sale and payment of a valuable consideration, it will materially impair the validity of the neutral claim. *Ibid.*
7. Evidence to acquit or condemn must come, in the first instance, from the papers of the officers and crew of a captured ship, and leave for further proof is granted in cases of honest mistake or ignorance, or to clear doubts or remedy defects, but the application must be supported by evidence of probable cause and good faith, or it will be rejected. *Ibid.*
8. Prize courts will not, in general, grant an order for further proof, where it clearly appears that the party moving for the order has knowingly attempted to cover and claim an enemy's interest in the captured property, whether the purpose of the claimant was to protect his own interest, or to benefit the enemy owner. *Ibid.*
9. Persons claiming to be the owners of property captured as prize, and wishing to procure the restitution of the same, must file their claim before the proper court. The master or agent may make the claim, but it must be made in behalf of the proper party; and if no claim at all be made, the presumption is that it is enemy's property, and the same must finally be condemned. *Ibid.*
10. Claims presented after the proofs have been opened and examined, and after hearing the reasons assigned for the condemnation, are never favored. *Ibid.*

PROMISSORY NOTE.

1. Where a party in Massachusetts, bound to the payment of a simple contract debt, gives his own promissory note for the debt, the presumption, in the absence of any proof to the contrary, is, that such note was accepted by the creditor in satisfaction and discharge of the pre-existing debt. *Hudson v. Bradley*, 130.
2. Such presumption is, however, one of fact only, and may be rebutted and controlled by any evidence showing that such was not the intention of the parties. *Ibid.*
3. If it appear that the note was not the obligation of all the parties who were liable for the original debt, and *a fortiori*, where it appears that the note was that of a third party, and if held to be in satisfaction, would wholly discharge the party previously liable, then the presumption, if it exist at all, may be repelled by slight circumstances evidencing a contrary intention. *Ibid.*

REBELLION.

See INSURANCE, 6, 9.

REISSUE.

1. When the specification of a reissued patent is consistent with that of the original, and where there is no positive conflict or absolute inconsistency between them, it may be true, in the absence of fraud, that the specification of the reissue is conclusive evidence that the invention was made, and the means to accomplish the result invented, although the two specifications are different from each other. *Sickles v. Evans*, 203.
2. But where it appears on the face of the respective specifications, as matter of law, that the specification and claim of the reissued patent are for a different invention from that secured in the original patent, the rule cannot be sustained. *Ibid.*
3. A reissue, by the express words of the statute authorizing the same must be for the same invention as the original; and, consequently, where it appears from a comparison of the two instruments, that the reissued patent is not for the same invention as that embraced in the original patent, the reissue is void. *Ibid.*
4. Under the fifth section of the act of March 3, 1837, when a patent is properly returned for correction and reissue, the Patent Office is authorized to reissue the original in several parts, if the patentee desires it, and pays the additional sum or sums required by law. *Goodyear v. Providence Rubber Co.*, 351.
5. An inventor claimed "curing caoutchouc or india-rubber, by subjecting it to a high degree of artificial heat"; also "curing the compound of india-rubber, sulphur, and a carbonate or other salt or oxide of lead, by subjecting the same to the action of artificial heat"; but in the descriptive part of the specification declined to limit himself to the exact compound last named, and set

out others. A reissue of the patent claimed "a combination of india-rubber with sulphur, with or without other ingredients, chemically altered by the application of heat." It was *held*, that the latter claim, when construed in the light of the description, was not invalid by reason of embracing more than the former. *Ibid.*

6. The reissued patent having been issued in two parts, one claiming a process and the other the product thereof, the claim for the process, when construed in view of both the earlier and later specifications, was *held* not to be broader than the corresponding claim in the original, in so far as it claimed mixing with the rubber other ingredients than sulphur; but the second claim of the reissue was held void, because it included not only india-rubber when compounded with sulphur and subjected to artificial heat, but other vulcanizable gums, — no other gums having been described in the original patent nor in the one to which the claim was appended. *Ibid.*
7. Reissued letters-patent supersede the original, but a pending application for the purpose of reissue, does not have that effect, no matter how nearly the proceedings may have approached a consummation, so long as they are not fully completed. *Forbes v. Barstow Stove Co.*, 379.
8. Prior to the issue of the new patent, the surrender, so called, is nothing but a preliminary offer, which is a necessary means of obtaining a reissue, and may be so treated by the Commissioner, at the request of the party applying for the reissue, in the absence of fraud. *Ibid.*
9. In this case it was held that the evidence showed the application to have been withdrawn and the duty refunded for good and sufficient reasons. *Ibid.*
10. The claims of an original patent on reed musical instruments were as follows: "Making an exhausting-bellows for reed instruments, consisting of two chambers combined with each other, and with the reeds placed above, so that the chamber next the sounding-board shall be enlarged by a weight on the first flap, substantially as herein described, and exhausted by the action of the second flap," &c. The patent was twice reissued, and the claims thereof were as follows. Of the first reissue, "the combination of the reeds with an exhaust-chamber of variable capacity, and an air-pump whose action exhausts and rarefies the air therein, — the exhaust-chamber tending to expand with a force that will balance the rarefaction to be preserved in the chamber." Of the second reissue, "so connecting the board which contains the reed seats, or perforations for the reeds, with the exhausting bellows, that it shall form substantially a part of the stationary leaf or cover of the exhaust-chamber thereof, while the exhausting or pumping chamber is placed in immediate connection with the said exhaust-chamber, without the intervention of tubes, thus improving the tone of the reeds, and expediting their speaking, and giving a compact, light, and graceful form to the instrument," etc. This last reissue also claimed the reed cells in combination with the reed seats, the concentrating chamber in combination with the reed cells and reed seats; the last two combinations, however, only when used with a suction or exhaust bellows. *Held*, that when viewed in connection with the descriptive parts of the speci-

fication, the claims of the last reissue, although showing some connection with the original patent, were still too widely different from it, and based to such an extent upon interpolations in the description of the last reissue, that they must be construed as embracing more than was described, claimed, or indicated in the original, that they were not for the invention therein described, and were void. *Cahart v. Austin*, 528.

11. Where the claims of a reissue contain new patentable matters not shown in the original patent, and the same are so interwoven with other elements specified in the original, that they cannot be separated, no action can be maintained upon the original elements of the claim so constructed, but the entire reissued claim must be taken together. *Ibid.*
12. The reissue is granted in order to amend a defective original specification; but unless it is for the same invention, the commissioner has no authority to grant it. *Ibid.*
13. If it appear on the face of the two patents, by comparison, that the reissue is for a different invention from the original, the reissue is void. *Ibid.*
14. In a reissue the patentee may redescribe or claim not only what was well described or claimed in the original, but also what was defectively set out, suggested, or indicated in the drawings or specifications which properly belonged to the invention. *Ibid.*
15. The privilege of reissue was not given to make patents more elastic or expansive, and therefore more available for the suppression of other inventions of the same class. *Ibid.*

See COMMISSIONER OF PATENTS, 2, 5; DEFENCE, 5; PRACTICE, 18 - 21; SURRENDER, 1, 2.

REMEDY.

See CORPORATION, 2; PATENT, 14.

SALE.

See SHIPPING, 1 - 4.

SERVICE OF PROCESS.

1. Under the eleventh section of the Judiciary Act, when a party defendant is found in the district where the process issued, although not a resident thereof, he may lawfully be served with the process; but it cannot properly be said that he was found there, if he was inveigled or enticed into the district by false representations or deceitful contrivances, for the purpose of making such service upon him. *Union Sugar Refinery v. Mathiesson*, 305.
2. The general rule is, that a person illegally in custody at the suit of one party, is not privileged from arrest at the suit of another, except there be proof of concert or collusion; but prior illegal arrest and subsequent detention will render the service illegal, and entitle the defendant to an unconditional discharge. *Ibid.*

3. Courts of justice everywhere regard the employment of one legal process as a means of detaining a party till a second can be served upon him, such an abuse of the process as to render the second service unavailing; but whether the defendant is also entitled upon an *ex parte* application, to a discharge from the prior service as well, *quære. Ibid.*
4. Where an inventor, who had assigned his invention to certain third parties, invited the defendant, an infringer, into the jurisdiction where the assignees resided, for the avowed purpose of settling the controversy, but without the knowledge of such assignees, and procured an interview between the parties, at the close of which the defendant was served with process in consequence of such infringement, *held*, there was not sufficient evidence of deceptive contrivances to obtain service on the defendant, and that a motion to dismiss the action on that account must be overruled. *Ibid.*

SHERIFF.

See JURISDICTION, 2, 3; TRESPASS, 1-3.

SHIPPING.

1. The master is justified in selling the ship as the best thing that can be done for the interest of all concerned, under the following circumstances. *Fitz v. Galliot Amelie*, 440.
2. When the ship is disabled by perils of the sea, and the master has no means of getting the repairs done in the place where the injury occurred; or, if being in a place where the repairs might be made, he has no funds in his possession, and cannot, on account of the distance or other sufficient cause, communicate with the owner, and is not able to raise the necessary means by bottomry, or otherwise, to execute the repairs; also, if the injuries to the ship are so great that the cost of repairing her would be greater than her value after the repairs were completed; also, if the ship is disabled so that she cannot proceed, and the cost of repairs will amount to more than one half her value, reckoning one third new for old, and the master has no funds, and can neither procure any nor communicate with the owner, and the whole circumstances are such that a prudent owner would decide to break up the voyage. *Ibid.*
3. The circumstances, which create a moral necessity for the sale of the vessel by the master, have the effect to constitute the master the agent of all concerned, and therefore the title of the purchaser becomes complete and absolute. *Ibid.*
4. When a ship is thus lawfully sold, any lien upon her is transferred to the proceeds of the sale, which, by operation of law, become the substitute of the ship, in the sense of the admiralty law. *Ibid.*
5. The plaintiff, in 1863, shipped at St. John, New Brunswick, on board an American vessel, for a specified voyage, at an agreed rate of wages per month, viz., "\$25 per month," the said voyage to terminate in the United States. It was contended that the plaintiff was entitled to an amount, in the

currency of the United States, equal to the value of the contract price in this country, if paid in the currency of St. John. *Held*, There was no question of the relation of one currency to another involved in the case; the contract for wages being expressed in dollars and cents, and the payment to be made in this country, the plaintiff could recover no more than the amount specified in the contract. *Trecartin v. Ship Rochambeau*, 465.

6. Where a mariner who had shipped for a specified voyage was cruelly treated and beaten and threatened, in repeated instances, by the master, and in consequence, through fear, left the vessel at a port before the voyage was ended, *held*, that he was justified in so doing, and that the voyage, as to his contract, was ended. *Bush v. Schooner Alonzo*, 548.
7. An action, therefore, by the libellant for his wages, cannot be defeated upon the ground that he had not served out the voyage, but had wilfully deserted. *Ibid*.

See CONTRACT.

SLAVE-TRADE.

See JURISDICTION, 2-4; EVIDENCE, 7-11; INFORMER, 1.

SPECIFIC DUTY.

See APPRAISER, 3, 4.

SPECIFICATION.

1. The two principal purposes of a specification of a patent are, to enable the public to know of what the patentee claims to be the inventor, and to enable the public to practise the invention when the patent has expired. *Forbes v. Barstow Stove Co.*, 379.
2. The patentee, in his specification, does not address himself to the uninformed, but to persons of skill in the art to which the invention appertains; and he is only required to use such full, clear, and exact terms in his description as will enable persons of this class to produce the thing he describes. *Ibid*.
3. The purpose of the requirement of law, that an invention shall be described, in the patent, in such full, clear, and exact terms as to enable one skilled in the art to construct and use the same, is twofold: first, that, when the patent has expired, the public may avail themselves of its benefits; second, that, while the patent is in force, the public may not ignorantly infringe it, for want of clear definition of its character. *Mabie v. Haskell*, 507.

See REISSUE, 1-3.

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See COLLECTOR, 9, 10.

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See COLLECTOR, 14, 15, 16.

SURRENDER.

1. Although a surrender of an original patent is the act of the party making the application, still the application may be withdrawn, under leave of the Commissioner, for good cause shown, at any time before the proceedings are fully completed and duly recorded. *Forbes v. Barstow Stove Co.*, 379.
2. The act of Congress does not in terms require that a surrender shall be in writing. *Dental Vulcanite Co. v. Wetherbee*, 555.

TITLES.

See PRACTICE, 2.

TOWNS.

1. Towns in Massachusetts have no power in their corporate capacity to raise money to provide for the public defence, to pay bounties to enlisted or drafted men, unless by express delegation of such power to them by and from the legislature of the State. *Burrill v. City of Boston*, 590.
2. Acts of the legislature of Massachusetts authorizing towns to raise money to procure their quotas of volunteers in the late war of the Rebellion did not empower them to assess and collect taxes to defray the expenses of obtaining credits upon their quota, of residents previously enlisted but not enrolled and accredited to such towns. *Ibid.*
3. The mayor of a city in Massachusetts made a contract with a certain person to pay him a certain sum per man for every credit upon the volunteer quota of the city which he could obtain from those residents enlisted into the service of the United States prior to May 31, 1864, and not credited to the city. *Held*, that the mayor, as agent of the city council, if acting with their assent, had power to bind the corporation to the fulfilment of the contract, provided the corporation had power under their charter, and the acts of the State legislature to enter into it, but that the act of the State legislature of March 18, 1864, and a subsequent act, limited the appropriation of the money raised by a city under them, to the purpose of obtaining its proportion of volunteers in the United States military service, under certain orders of the President in said acts specified, and that they did not delegate an authority to raise money to pay the expenses of having previously enlisted men credited upon such cities' quota. *Ibid.*
4. *Held*, therefore, that the plaintiff was not entitled to maintain an action against the city upon such contract, inasmuch as the corporation had no authority to incur such an obligation. *Ibid.*

TRESPASS.

1. An attaching creditor, by giving a bond of indemnity to the sheriff, and ordering him to sell the attached property, thereby ratifies the act of his attorney in directing such attachment, and becomes liable as a trespasser to the owner of the property so attached, if the same is not the property of the debtor; and if such creditor is notified of a suit pending against the sheriff for such property, and appears and assumes the defence of the suit, the judgment rendered therein is conclusive in another suit against him for the same trespass. *Murry v. Lovejoy*, 191.
2. Judgment against the sheriff without satisfaction is not a bar to a subsequent suit against the attaching creditor.
3. Partial satisfaction by the sheriff of the judgment against him is not an obstacle to a subsequent suit against the attaching creditor, but will go in reduction of the damages.

See INFRINGEMENT, 1, 5.

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END OF VOL. II.

